STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals:
W.C. Whitbeck, C.J., K.J. Jansen, J.E. Markey, JJ.

THE PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

No. 125250

vs.

NICHOLAS JACKSON
Defendant-Appellant.

Lower Court No. 01-177534-FC
COA No. 242050

BRIEF OF THE WAYNE COUNTY PROSECUTOR'S OFFICE AS AMICUS CURIAE IN SUPPORT OF THE PEOPLE OF THE STATE OF MICHIGAN

KYM L. WORTHY
Prosecuting Attorney
County of Wayne

TIMOTHY A. BAUGHMAN
Chief of Research,
Training. and Appeals
11th Floor, 1441 St. Antoine
Detroit, Michigan 48226
Phone: (313) 224-5792

Table of Contents

TABLE OF AUTHORITIES

FEDERAL CASES

STATE AND ENGLISH CASES

OTHER SOURCES

Summary of Argument

The question of whether the Confrontation Clause is violated by admission of a particular out-of-court statement taken from a declarant who was not cross-examined at the time, and does not appear at trial, requires an attempt to determine the nature of "testimonial" statements under the *Crawford* decision. To determine those statements that are testimonial one must look to the principal harm or evil at which the Confrontation Clause was directed, in an attempt to determine what the framers and ratifiers were prohibiting. *Crawford* and the historical materials reveal that use of governmentally acquired formal statements—ex parte depositions and affidavits—at trial in place of the testimony of the declarants was the civil-law abuse at which the Clause was aimed. The task now is to identify those practices closely akin to the prohibited abuse. Amicus submits that only those statements taken by the government, through formal or structured questioning, resulting in a solemn or formal statement, qualify as testimonial statements. While many statements not barred by the Confrontation Clause will be inadmissible nonetheless under the law of evidence, this is a matter of policy under the law of evidence, and not constitutional law under the Confrontation Clause. An excited utterance by definition is not testimonial under these requirements.

Secondly, an allegation that the victim in a sexual-assault case has made prior false accusations of sexual assault is, when offered as probative of character for truthfulness (that is, the circumstances do not go to bias or interest), governed by Rule 608(b). Extrinsic proof of the alleged false claim is barred, and cross-examination is permissible only within the discretion of the trial judge. Because of the inherent prejudice in such a question where answered by the victim in the negative, leaving only innuendo before the jury, as a foundational matter the defendant should be required to offer proof to the trial judge that a prior claim was made, and the claim was demonstrably

false. Further, both as a foundational matter under Rule 608(b) and under rape-shield provisions, notice and an in camera hearing should be required. Though an actual false allegation of sexual assault is not barred by rape-shield principles, that the allegation was either made, or if made was false, cannot be *presumed.* If an insufficient showing is made that the allegation was even made, then the matter is irrelevant; if a sufficient showing is offered that it was made but an insufficient showing that it was false, then the matter is barred both by rape-shield principles and by a lack of relevance for the proffered purpose (a prior allegation which was *not* false does not bear on untruthfulness). Here, no sufficient offer of proof was made under any reasonable standard.

Statement of the Question

I.

Testimonial statements from a declarant not appearing in court may not be offered unless the declarant was subject to cross-examination. A testimonial statement is one akin to the common-law practice of magisterial examination. Is a statement made under circumstances lacking formality akin to this common-law practice testimonial?

Amicus answers: "NO"

II.

Extrinsic proof of prior bad acts bearing on untruthfulness is not permitted under Rule 608, though cross-examination may be allowed. A claim that a victim in a criminal sexual conduct case has made previous unrelated false claims of sexual assault falls squarely within Rule 608, so that extrinsic proof is prohibited. Before cross-examination is permitted, should the defendant be required to show by proof that is virtually dispositive that a prior allegation was made and that it was false?

Amicus answers: "YES"

Statement of Facts

Amicus joins in the Statement of Facts of the appellee, the People of the State of Michigan, whom amicus supports.

Argument

I.

Testimonial statements from a declarant not appearing in court may not be offered unless the declarant was subject to cross-examination. A testimonial statement is one akin to the common-law practice of magisterial examination. A statement made under circumstances lacking formality akin to this common-law practice is not testimonial.

A. The Task At Hand: The Nature of Our Written Constitution

If a provision of the Constitution is to be construed or interpreted, it is important to understand the nature of that enterprise, and to that end fundamental to acknowledge the nature and function of the governing document itself. If the Constitution is, as it proclaims to be, "the supreme Law of the Land....,"[1] and if it is the task of courts "to say what the law *is*"[2] and not what it should be, then the source of that "supreme Law of the Land" needs be identified. This is particularly important in a case like the present one, where on the face of it the text at issue is susceptible of at least two very different interpretations,[3] so that an examination of that which was sought to be accomplished by adoption of the clause becomes paramount.

(1) Sovereignty–and thus the ultimate source of all law–is located in the People

The source of all political power and authority in this country is quickly established in the preamble to the Constitution: "We the people of the United States...do ordain and establish this

---

[1] U.S. Const. art. VI, Paragraph 2

[2] *Marbury v Madison*, 1 Cranch 137, 2 L Ed 60, 73 (1803).

[3] See section D(3), infra.

Constitution for the United States of America."[4] Sovereignty in the United States is located not in the government, but in the People, who stand above the government, the Constitution being a durable expression of their will as the Supreme Law of the Land, both enabling and limiting government as their servant. This view of the Constitution and our system of government is scarcely some recent contrivance. Repeatedly during the ratification debate on the Constitution the image of the People as the "fountain of all power" was employed. In his letter of December 24, 1787 to Charles Tillinghast, refuting the pamphlet "Letters From the Federal Farmer," Timothy Pickering observed that under the Constitution both Congress and the state legislatures would be the servants of the people, because the people are the "*fountain* of *all power*."[5] The *Federalist XXII* described the Articles of Confederation as infirm in no small measure because they "never had a ratification by the People." "The fabric" of the country, said Hamilton, must rest on the "consent of the People," and the "streams of national power ought to flow immediately from that pure original fountain of all legitimate authority."[6] After ratification of the Constitution by the Connecticut Convention Samuel Holden Parsons wrote to William Cushing minimizing the lack of a Bill of Rights, finding that objection of "no weight," as the Constitution was "grounded on the Idea that the People are the fountain of all Power."[7] That great advocate for ratification, James Wilson, in his opening address

---

[4] And the same is true in the preamble to the Michigan Constitution—"We, the people of the State of Michigan, grateful to Almighty God for the blessings of freedom, and earnestly desiring to secure these blessings undiminished to ourselves and our posterity, do ordain and establish this constitution."

[5] I *The Debate On The Constitution* (Bernard Bailyn, ed, 1993) , p. 301.

[6] Bailyn, I *Debate,* at 516.

[7] Bailyn, I *Debate,* at 748.

to the Pennsylvania Ratifying Convention on November 24, 1787, raised the issue of sovereignty, remarking that "In all governments...there must be a power established, from which there is no appeal–and which is therefore called absolute, supreme, and uncontroulable. The only question is, where that power is lodged?"[8] Under the proposed Constitution, he answered, sovereignty "remains and flourishes with the people."[9] Responding to William Findley's argument that the proposed Constitution would destroy the individual States, as evidenced by the Preamble itself, where "it is said, *We the People*, and not *We the States*," Wilson disagreed with Findley's premise that sovereign power resided in the state governments. Rather, said Wilson, "my position is, that the sovereignty resides in the people," who are the "source of authority," the Constitution creating a government not founded upon any theory of compact, but "upon the power of the people."[10] This conception of sovereignty differed markedly from that in England, Charles Coteworthy Pinkney explained to the South Carolina Ratifying Convention on May 14, 1788, for under the proposed Constitution "all power or right belongs to THE PEOPLE–...it flows immediately from them, and is delegated to their officers for the public good," the officers of government—including judicial officers—being "the servants of the people, amendable to their will, and created for their use," while in Europe "the people are the servants and subjects of their rulers."[11]

---

[8] Bailyn, I *Debate,* at 801.

[9] Bailyn, I *Debate,* at 802.

[10] Bailyn, I *Debate,* at 818, 820, 836.

[11] Bailyn, I *Debate,* at 577-578, Pinckney also referring to the people as the "fountain of all power."

It was on this question of sovereignty–the pivotal question of the nature and location of the ultimate power of the State–that the Revolution was fought, for it was this issue that lead to the American conception of a written constitution as fundamental law, and to a revolutionary change in American political theory.[12] As John Adams wrote to Thomas Jefferson in 1815, looking back on the founding of the country:

> What do we mean by the Revolution? The war? That was no part of the Revolution; it was only an effect and consequence of it. The Revolution was in the minds of the people, and this was effected from 1760 to 1775; in the course of fifteen years before a drop of blood was shed at Lexington.[13]

This revolution of mind took place as a reaction to the events of the 1760's and 1770's, and to the British conception of sovereignty.

(2) <u>The Constitution is a durable expression of the will of the People, alterable only in the manner provided in the document</u>

By the mid-1760's the British conception of its constitution as "that assemblage of laws, customs, and institutions which form the general system according to which the several powers of the state are distributed and their respective rights are secured to the different members of the community"[14] was foreign to the colonists. In England, parliament possessed the sovereignty of the nation, and the colonial experience with parliament led the colonists to an idea of a constitution that was very different than the English notion. While for England the constitution *was* the system of

---

[12] Bernard Bailyn, *The Ideological Origins of the American Revolution* (Harvard University Press, 1967), p. 198.

[13] Bailyn, I *Origins*, p.1.

[14] Charles Inglis, *The True Interest of America...Strictures on a Pamphlet Entitled Common Sense*, p.18 (replying to Thomas Paine's *Common Sense*).

government, with nothing standing outside of the government to limit and restrain it, the colonists believed that there existed fundamental principles and rights that required protection from arbitrary interference, and came rather quickly to the view that the only manner of protecting them was to lift them out of the government and place them in a superior position. The events of the conflict with England of the 1760's and 1770's not only pushed the colonists toward a different view of popular sovereignty, but to the revolutionary view of a constitution as something distinct from and superior to the entire government, expressing fixed principles designed to endure unless altered by the people.[15] As early as 1768, then, Samuel Adams wrote that "in all free States the Constitution is fixed; and as the supreme Legislature derives its Power and Authority from the Constitution, it cannot overleap the Bounds of it without destroying its own foundation."[16]

The colonists "recognized from the beginning that a constitution ought to be different in kind from ordinary legislation" and "ought to bear some sort of direct popular authorization that would place it beyond the power of government to change," embodying "the difference between the constituent power of the people and the legislative power of the people's representatives."[17] A constitution "should not be altered without the Consent, or Consulting with the Majority of the people."[18] By 1770 the constitution was said to be a "line which marks out the enclosure"; in 1773 it was the "standing measure of the proceedings of government" of which rulers are "by no means

---

[15] Gordon S. Wood, *The Creation of the American Republic, 1776-1787* (1969), 266.

[16] Cushing, ed., I *Writings of Samuel Adams*, p. 185.

[17] Edmund Morgan, *Inventing the People: The Rise of Popular Sovereignty in England and America* (1988), p. 256-258.

[18] Wood, p. 274.

to attempt an alteration...without public consent." In 1775 it was said that the constitution was "certain great first principles" on whose "certainty and permanency the rights of both the ruler and the subjects depend; nor may they be altered or changed by ruler or people, but only by the whole collective body...nor may they be touched by the legislator."[19] Such a constitution must be written so as to acquire permanence, and, to stand above the government as the fundamental source of authority, it must represent the sovereign power; that is, the people, through an "act of all."[20]

Because the people were sovereign and the "fountain of all power," and because the rights of the people could be protected only by a permanent constitution, the alteration of which was not possible by any portion of the government (including the judiciary), but only by the people, who possessed the "constituent power" of government, only a constitution based on the authority of the collective people could stand as more than the will of the legislature, superior to the government itself. As brilliantly expressed by Thomas Tudor Tucker in his pamphlet *Conciliatory Hints, Attempting by a Fair State of Matters, to Remove Party Prejudice*:

> The constitution should be the avowed act of the people at large. It should be the first and fundamental law of the State, and should prescribe the limits of all delegated power. It should be declared to be paramount to all acts of the Legislature, and irrepealable and unalterable by any authority but the express consent of a majority of the citizens collected by such regular mode as may be therein provided.[21]

---

[19] Bailyn, *Origins*, p. 182.

[20] Bailyn, *Origins*, p. 183-189.

[21] Wood, p. 281.

This was, as Gordon Wood has said, "a conclusive statement that has not essentially changed in two hundred years."[22] What was required, then, to create a charter of government that was a durable expression of the will of the people, both authorizing and limiting government, and standing outside of and superior to all agencies of government, was a constitutional convention, consisting of delegates appointed to represent the people, called for that purpose, their handiwork to be presented to the people in turn in ratifying conventions called expressly for the purpose of ratification or rejection. Only then could the constitution be the supreme law and unalterable by the government. This was a "radical innovation in politics, signifying the transformation taking place in the people's traditional relationship with government."[23] The principle was so firmly established by the 1780's that "governments formed by other means actually seemed to have no constitution at all."[24]

To sum up:

- In our republican form of government, the people are sovereign, and the Constitution–the charter of government–is a durable expression of their will. By creating the government, the Constitution, as the highest expression of the consent of the sovereign people to that government, both empowers and restrains government.

- The Constitution thus stands outside of and superior to the government; that *any* body of the government might possess the power to alter the constitution in a republic is unthinkable.[25]

- The Constitution, as a durable expression of the will of the sovereign people–the avowed act of the people–is irrepealable and unalterable by any authority except the people themselves, in the mode provided

---

[22] Ibidem.

[23] Wood, p. 309.

[24] Wood, p. 342.

[25] Wood, p. 279.

by the Constitution.

- All bodies of government are the creation of the people through the Constitution, and all individuals holding government office are the servants of the people, exercising only that authority that exists in their office.

B. The Task At Hand: The Nature of Interpretation

These principles, which bear directly on the interpretive task, have long been part of Michigan's jurisprudence. Justice Cooley said in his celebrated treatise on constitutional law that "[T]he constitution does not derive its force from the convention which framed, but from the people who ratified it...."[26] Both Justice Cooley and Justice Campbell spoke to the point in *People v Blodgett*,[27] Justice Campbell observing that "The constitution is eminently a popular instrument, binding according to its terms, and requiring for their interpretation such rules as will not warp its sense from what its language shows *it probably appeared to those who adopted it*."[28] Further, "[T]he constitution, although drawn up by a convention, derives no vitality from its framers, but depends for its force entirely upon the popular vote. Being designed for the popular judgment, and owing its existence to the popular approval, its language must receive such a construction as is most consistent with plain, common sense, unaffected by any passing excitement or prejudice."[29] Similarly, Justice Cooley stated that "There are certain well settled rules for the construction of statutes, which no court can safely disregard. Where the statute is plain and unambiguous in its

---

[26] Cooley, *Constitutional Limitations*, at 66.

[27] *People v Blodgett,* 13 Mich 127 (1865).

[28] *Blodgett*, at 141 (emphasis added).

[29] *Blodgett*, at 141.

terms, the courts have nothing to do but to obey it....The fair and natural import of the terms employed, in view of the subject matter of the law, is what should govern....These rules are especially applicable to constitutions; for the people, in passing upon them, do not examine their clauses with a view to discover a secret or a double meaning, but accept the most natural and obvious import of the words as the meaning designed to be conveyed."[30]

This being the case, then, the meaning of a constitutional provision is to be garnered understanding that the ratifiers looked to the words employed "in the sense most obvious to the common understanding, and ratified the instrument in the belief that that was the sense to be conveyed."[31] As Justice Campbell said long ago:

> The meaning of our constitution was fixed when it was adopted, and the question which is now before us is not different from what it would have been had the constitution been recently adopted. These charters of government are adopted by the people for their own guidance, as well as for the guidance of the governments which they establish. They are designed to provide for contingencies not foreseen as well as those which are foreseen. ... [I]t may easily happen that specific provisions may, in unforeseen emergencies, turn out to have been inexpedient. This does not make these provisions any less binding. Constitutions can not be changed by events alone. They remain binding as the acts of the people in their sovereign capacity, as the framers of government, until they are amended or abrogated by the action prescribed by the authority which created them .... The constitution is eminently a popular instrument, binding according to its terms, and requiring for their interpretation such rules as will not

---

[30] *Blodgett*, at 167-168.

[31] Cooley, at 66. And see Joseph Story, *A Familiar Exposition of the Constitution of the United States* (Regnery Gateway Bicentennial Edition, 1986), p. 57-58: the Constitution "is to be interpreted...by endeavoring to ascertain the true sense and meaning of all the terms; and we are neither to narrow them, nor to enlarge them, by straining them from their just and natural import....It is the language of the people, to be judged of according to common sense....[T]he people have established it and spoken their will; and their will, thus promulgated, is to be obeyed as the supreme law."

> warp its sense from what its language shows it probably appeared to those who adopted it.[32]

Though the Constitution is certainly "as meant to apply to the present state of things as well as to all other past or future circumstances," "[I]t is not competent for any department of the government to change a constitution, or declare it changed, simply because it appears ill adapted to a new state of things."[33]

The Confrontation Clause provides that in criminal cases the accused has the right to be "confronted with the witnesses against him." The text is not particularly revealing; here, then, in determining what, in their sovereignty capacity, the people promulgated requires an examination

---

[32] *Blodgett*, at 141.

[33] Justice Scalia, the author of *Crawford*, has said "I will consult the writings of some men who happened to be delegates to the Constitutional Convention–Hamilton's and Madison's writings in *The Federalist*, for example. I do so, however, not because they were Framers and therefore their intent is authoritative and must be the law; but rather because their writings, like those of other intelligent and informed people of the time, display how the text of the Constitution was originally understood....What I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text, not what the original draftsmen intended." Scalia, *A Matter of Interpretation* (Princeton University Press, 1997), p. 38.

The views of Justices Campbell, Cooley, and Scalia are scarcely idiosyncratic. See e.g. also Bishop, *Commentaries on the Law of Statutory Crimes* (Little, Brown, and Company, 1883), § 93. And further, see letter of James Madison to Henry Lee, 9 *The Writings of James Madison* (G. Hunt ed. 1910), p.190."I entirely concur in the propriety of resorting to the sense in which the constitution was accepted and ratified by the nation. In that sense alone it is the legitimate Constitution....If the meaning of the text be sought in the changeable meaning of the words composing it, it is evidence that the shape and attributes of the Government must partake of the changes to which the words and phrases of all living language are constantly subject"; and also unposted letter of Madison to professor John Davis, 3 *Letters and Other Writings of James Madison* (1884), p. 232, 242: "After all, we must be guided...by the intention of those who framed, or, rather, who adopted the constitution....the intention, if ascertained by contemporaneous interpretation and continued practice, could not be overruled by any latter meaning put on the phrase, however warranted by the grammatical rules of construction were those at variance with it."

of the history that led to the clause—that is, the harm it was designed to prevent. *Crawford* has started, but only started, this task of interpretation.[34]

---

[34] Though some might find the foregoing exposition tiresome, or worse, irrelevant, that the history and purpose of a constitutional provision go far toward resolving its meaning, particularly in cases of ambiguity, was demonstrated once again by the recent case of *Granholm v Heald*, __US__, 125 S Ct 1885 (2005). There the Court construed Section 2 of the Twenty-first Amendment, the amendment ending prohibition, which expressly provides that "[t]he transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." Though on its face the provision prohibits in absolute terms the importation of alcohol in violation of the receiving state's laws, the Court found that the provision does *not* permit a state to discriminate between in-state and out-of-state shipments of wine (allowing direct sales to consumers from in-state wineries and prohibiting them from out-of-state wineries), concluding that the history of the provision demonstrates that § 2 restored to the States "the powers they had under the Wilson and Webb-Kenyon Acts....The wording of § 2 of the Twenty-first Amendment closely follows the Webb-Kenyon and Wilson Acts, expressing the framers' clear intention of constitutionalizing the Commerce Clause framework established under those statutes." 125 S Ct 1902. The Court further looked to the purpose of the provision as a tool of construction: "The aim of the Twenty-first Amendment was to allow States to maintain an effective and uniform system for controlling liquor by regulating its transportation, importation, and use. The Amendment did not give States the authority to pass nonuniform laws in order to discriminate against out-of-state goods, a privilege they had not enjoyed at any earlier time." 125 S Ct 1902. And even those justices dissenting did so primarily on a disagreement with the majority's reading of the historical materials.

C. The Confrontation Clause and Crawford[35]

(1) Gleanings from Crawford

(a) Historical background

Kenneth Lee was stabbed to death. Both Crawford and his wife were given Miranda warnings and interrogated by detectives. Their versions of the altercation with Lee differed in material details. Crawford asserted the spousal privilege to prevent his wife from testifying, but under state law any out-of-court statement within a hearsay exception was admissible. His wife's statement was admitted at trial as a declaration against penal interest. Though the state Court of Appeals reversed on grounds that the statement did not bear particularized guarantees of trustworthiness, the State Supreme Court found it did. In a groundbreaking decision, the United States Supreme Court rejected this mode of analysis with regard to Confrontation Clause claims.

The text of the clause provides a right in the accused to be"confronted with the witnesses against him." What does this mean? Critical to the Court in *Crawford* was the historical development of the Confrontation Clause, for that development informs its meaning.[36] The founding generation's immediate source of the concept was the English common law, which reveals that though the Confrontation Clause is related to the rules concerning hearsay, it was meant to prohibit only a specific sort of hearsay, not to freeze the law of evidence.

---

[35] *Crawford v Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

[36] "A page of history is worth a volume of logic." *NY Trust Co. v. Eisner*, 256 US 345, 349, 41 S Ct 506, 65 L d. 963 (1921) (Justice Holmes). See also the method of interpretation in *Granholm v Heald*, at footnote 34, supra. And see Section A, supra.

The history of the hearsay rule began only in the 1500's. Up to that time, though jury trial had come into being, it was a common practice for the jury to obtain information from informed persons not called into court. Testimony in open court was a rare event. Testimony in open court began to develop during the 1500's and 1600's, reversing the earlier order, with testimony becoming common, and consultation by the jury with informed persons not called into court becoming rare. At times the English practice adopted civil-law elements; justices of the peace or other officials examined suspects and witnesses before trial, and these examinations were sometimes read in court in lieu of testimony. The question began to arise whether hearsay was competent evidence in court.[37]

The infamous trial of Sir Walter Raleigh in 1603 for treason is often thought of as the father of the constitutional Confrontation Clause. Raleigh had no assistance from counsel, and would not have been allowed to call witnesses had he wished to do so. The only defense of the accused was that the case against him had to be completely proved. If it was, there was no need of witnesses from the accused; if it was not, there was likewise no need for witnesses from the accused–a "catch-22" worthy of Joseph Heller. Raleigh insisted that the case could not be proven unless he faced his accusers. Depositions given by Raleigh's alleged accomplice were admitted, and even these contained only innuendo, with no credible assertions of substance sufficient to support a conviction. But Chief Justice Popham refused to produce Cobham, the alleged accomplice, to testify, stating that "where no circumstances do concur to make a matter probable, then an accuser may be heard in

---

[37] 5 Wigmore, *Evidence* § 1364

court, and not merely by extrajudicial statement, but so many circumstances agreeing and confirming the accusation in this case, the accuser is not to be produced."[38]

These practices were decried and viewed as abusive, and the law developed relatively strict rules of unavailability, admitting examinations only on a showing of inability to testify in person. But was even unavailability enough without cross-examination at the magisterial examination? *King v Paine*[39] in 1696 held not. Though the case involved a misdemeanor, *Crawford* points out that by 1791—the year the 6th amendment was ratified—courts were applying the cross-examination requirement to examinations by justices of the peace in felony cases.[40] Early 19th century treatises confirm the requirement, and in 1848 parliament amended statutes to make it explicit, confirming what was already afforded the defendant by the equitable construction of the law.[41]

Colonial practices, observed *Crawford*, were sometime abusive in a similar manner as the early common-law practice, and confrontation arguments were advanced. Many declarations of rights about the time of the Revolution included, then, a right to confrontation,[42] and early state decisions held that depositions could be read against an accused only if taken in his presence–"no man shall be prejudiced by evidence which he had not the liberty to cross examine."[43]

---

[38] 5 Wigmore § 1364, p. 16-17; *California v Green*, 399 US 149, 26 L Ed 2d 489, 90 S Ct 1930 (1970) (fn 9 and 11, p.507-508);

[39] *King v Paine*, 5 Mod. 163, 87 Eng. Rep. 584 (1696)(cited in *Crawford*).

[40] 124 S Ct at 1361.

[41] 124 S Ct at 1361.

[42] 124 S Ct at 1363.

[43] 124 S Ct at 1363.

(b) Conclusions drawn in Crawford

From these historical materials the conclusion ineluctably follows that the principal evil at which the Confrontation Clause was directed was the civil-law mode of *ex parte* examinations used as evidence at trial. But this focus also suggests that not all hearsay implicates the Confrontation Clause; the admission of out-of-court statements from unavailable declarants where the statements occurred in situations that bear "little resemblance to the civil-law abuses the Confrontation Clause targeted"[44] are left to the law of evidence of the federal system and the various states.[45]

Which, then, are those contexts in which statements are made bearing sufficient resemblance to the abuses of the civil-law practice as to warrant their exclusion under the Confrontation Clause and which not? *Crawford* gives hints or guidelines, but no clear answers. The text of the clause applies the right of confrontation to a confrontation of "witnesses"—those who "bear testimony." Testimony is typically a "*solemn* declaration or affirmation made for the purpose of establishing or proving some fact."[46] Thus, "an accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not."[47] Because the context bears a "striking resemblance" to examinations by justices of the peace in

---

[44] 124 S Ct at 1364.

[45] 124 S Ct at 1374.

[46] 124 S Ct at 1375.

[47] 124 S Ct at 1364.

England, "statements taken by police officers in the course of interrogations[48] are also testimonial." But what of other statements and other contexts? How are they to be measured?

D. Can I Get A Witness: Testimonial Statements

(1) Dispelling a misconception: Crawford does not endorse three definitions of "Witnesses Against"

Crawford's discussion of testimonial statements is, of course, critical to the inquiry here. But it is first necessary to clear away some underbrush by addressing what *Crawford* did *not* hold, as the decision has come to be widely misrepresented and misapplied in critical particulars. *Crawford* did not provide a comprehensive definition of "testimonial"; indeed, it disclaimed any such attempt: "We leave for another day any effort to spell out a comprehensive definition of 'testimonial.'"[49] Despite this quite clear disclaimer, the following section of *Crawford* has been taken by an unfortunately increasing number of courts as establishing the "three faces" of testimonial statements:

> *Various formulations of this core class of "testimonial" statements exist*:
>
> - "*ex parte* in-court testimony or its functional equivalent–that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably

---

[48] The Court observed that "[W]e use the term "interrogation" in its colloquial, rather than any technical legal, sense. Cf. *Rhode Island v. Innis,* 446 U.S. 291, 300-301, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980). Just as various definitions of 'testimonial' exist, one can imagine various definitions of 'interrogation,' and we need not select among them in this case. Sylvia's [Crawford's wife's] recorded statement, knowingly given in response to *structured police questioning*, qualifies under any conceivable definition." 541 U.S. 36, 53, 124 S.Ct. 1354, 1365.

[49] 541 US 36, 68, 124 S Ct 1354, 1374.

expect to be used prosecutorially," Brief for Petitioner 23;

- "extrajudicial statements ... contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions," *White v. Illinois,* 502 U.S. 346, 365, 112 S.Ct. 736, 116 L.Ed.2d 848 (1992) (THOMAS, J., joined by SCALIA, J., concurring in part and concurring in judgment);

- "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial," Brief for National Association of Criminal Defense Lawyers et al. as *Amici Curiae*.

These formulations all share a common nucleus and then define the Clause's coverage at various levels of abstraction around it. *Regardless of the precise articulation*, some statements qualify under any definition–for example, *ex parte* testimony at a preliminary hearing. Statements taken by police officers in the course of interrogations are also testimonial under even a narrow standard.[50]

But this section of the *Crawford* opinion does *not* create three "categories" or "classes" of testimonial statements, it being the task of a court reviewing the evidence in question to see if it fits within one of these categories.[51] One court, as an example of this approach, has said that "[O]ur initial task then is to determine whether the statement...was testimonial. In a passage of the *Crawford* opinion that is often quoted [the passage quoted above], the Court *identified three kinds of statements that could*

---

[50] 541 U.S. 36, 51-52, 124 S.Ct. 1354,1364 (bullet points and emphasis added).

[51] This approach to *Crawford* reminds one of Chief Justice (then Justice) Rehnquist's observation in a different context, that this mode of analysis reveals a "mind-set more useful to those who officiate at shuffleboard games, primarily concerned with which particular square the disc has landed on...." *Florida v. Royer,* 460 US 491, 520, 103 S Ct 1319, 1336 (1983).

be properly regarded as testimonial statements...."[52]; another, in the same vein, asserts that the Court in *Crawford* "also stated that testimonial statements were 'statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'"[53]

But the Court did *not* in *Crawford* either "identity three kinds of statements that could properly be regarded as testimonial" or say that "statements that were made under circumstances which would lead an objective witness reasonably to believe the statement would be available for use at a later trial" are necessarily testimonial. As is clear from the text of the passage itself, and as at least one commentator has accurately observed, "[T]he Court did not endorse any of these three potential definitions."[54] The opinion expressly leaves for another day any effort to spell out a comprehensive definition of "testimonial," concluding that "[W]hatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed."[55] This is all that *Crawford* held, leaving all else to future development. One must look, then, to whether there are other practices that can fairly be said to bear close kinship to the abuses at which the Confrontation Clause was directed, and one discovers that while the clause "applies at a minimum" to prior testimony (including depositions and

---

[52] *Lopez v State*, 888 So 2d 693, 698 (Fla Ct App, 2004).

[53] *Anderson v State*, __P3d__ (2005 WL 8385773 (Alaska App, 4-15-2005).

[54] King-Reis, Andrew, "Crawford v Washington: The End of Victimless Prosecution?" 28 Seattle U L Rev 301, 316 (2005). The title of the article is itself a misnomer, however, for crimes where the victim does not testify are scarcely "victimless" (see all murder prosecutions).

[55] 541 US 36, 68, 124 S Ct 1354, 1374 .

affidavits) and to police interrogations, it covers very little else (which is not to say that it is not the case that many categories of extrajudicial statements may be identified that are not, and should not be, admissible under the law of evidence, but the Confrontation Clause limitations are far narrower—and unamenable to alteration except by constitutional amendment—than the law of evidence).

(2) The impossibility of "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial" as a test for "Witnesses Against"

The alternative definition advanced in *Crawford* by the National Association of Criminal Defense Lawyers that testimonial statements are "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial" is both under and over-inclusive; it is also contrary to human experience, and essentially useless in the inquiry, if not downright misleading.[56] An examination of every out-of-court statement to determine whether it was made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial is akin to "a snipe hunt carried on at midnight on a moonless landscape."[57] And it is a snipe hunt in which many courts, as indicated, are currently engaged. This enterprise is bootless for reasons noted by Justice Thomas concurring in *White v Illinois*:[58]

---

[56] And the same is true for the formulation in the petitioner's brief in *Crawford* that a statement should be considered testimonial if it is one that the declarant "declarants would reasonably expect to be used *prosecutorially*"—whatever *that* means.

[57] *590 Realty Co., Ltd. v. City of Keene*, 444 A 2d 535, 536 (N.H.,1982).

[58] *White v. Illinois* 502 US 346, 364, 112 S Ct 736, 747 , 116 L Ed 2d 848 (1992)(emphasis suppled).

> Attempts to draw a line between statements made in contemplation of legal proceedings and those not so made would *entangle the courts in a multitude of difficulties*. Few types of statements could be categorically characterized as within or without the reach of a defendant's confrontation rights. Not even statements made to the police or government officials could be deemed automatically subject to the right of confrontation (imagine a victim who blurts out an accusation to a passing police officer, or the unsuspecting social-services worker who is told of possible child abuse). It is also not clear...whether the declarant or the listener (or both) must be contemplating legal proceedings.

The approach taken in *Crawford* to the relationship between hearsay declarants and the Confrontation Clause was presaged by the writings of a number of commentators, perhaps foremost among them Professors Akhil Reed Amar and Richard Friedman, both cited in *Crawford*. Professor Amar undertakes a contextual or structural constitutional analysis, and concludes that, despite its occasional disclaimers, the Supreme Court had, prior to *Crawford* (Professor Amar writing here before that decision), conflated the term "witness" with the at least somewhat different notion of an "out-of-court declarant whose utterance is introduced for the truth of the matter asserted."[59] But "witness" is used elsewhere in the Constitution, observes Amar—in the treason clause of Article III, § 3, the Fifth Amendment self-incrimination clause, and the Sixth Amendment compulsory-process clause. In none of these can the word "witness" be taken to mean "out-of-court declarant, whose utterance is offered for the truth of the matter asserted." While it is quite possible for words in a document to mean something different than they mean in ordinary language, it would have been decidedly odd for the Framer's to have used "witness" not only differently than the term would have been understood by the ordinary citizen, but also in different ways in different sections of the

---

[59] Akhil Reed Amar, *The Constitution and Criminal Procedure* (Yale University, 1997), p. 127.

constitution.[60] Professor Amar concludes that to read "witness against" as referring to witnesses actually testifying in court, and also to such materials as videotapes, transcripts, depositions, and affidavits, *when prepared for court use and introduced as testimony*, is consistent with the text of the Confrontation Clause, its context within the Constitution, and with history.[61]

Professor Friedman's approach is largely consistent with that of Professor Amar and with Justice Thomas's approach in *White*, but goes a step further— the step later championed in *Crawford* by the National Association of Defense Attorneys. Professor Friedman includes within the Confrontation Clause not only "formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions" but also any statement made by a person who at the time of its making "reasonably should be viewed as having made it with the anticipation that it would be presented at trial."[62] But Professor Friedman quickly slips away even from this formulation later in his article, and in a way that some courts attempting to apply this "test" have also, for he also states the test to be whether the declarant "anticipates that the statement will be used in the prosecution *or investigation* of a crime."[63] A test requiring an expectation by the declarant that the statement will itself be used at trial, though itself unworkable, atextual, and ahistorical, is quite a different thing from a test that the declarant have a reasonable expectation that the statement might be used in an

---

[60] Amar, at 127-128: "...in a Constitution ratified by, subject to, and proclaimed in the name of, the people, it would be unfortunate if words generally could not be taken at face value....[and] surely a careful ordinary citizen ...pondering the word *witness* might look to see how the word is used elsewhere in the Constitution itself."

[61] Amar, at 129-130.

[62] Richard Friedman, "Confrontation: The Search for Basic Principles," 86 Geo L J 1011,1040 (1998).

[63] Friedman, at 1042.

investigation. Friedman's definition of "witnesses" against" as including all unavailable out-of-court declarants who make statements to investigating police officers cannot be justified historically, contextually, or textually.[64]

Several examples reveal Justice Thomas's prescience in this regard. Many courts, for example, have already considered the admissibility of 911 calls made by unavailable declarants, some unhelpfully distinguishing between 911 calls reporting a crime and 911 calls seeking help during an ongoing crime.[65] Compare and contrast several cases.

---

[64] And see Amar, "Confrontation Clause First Principles: A Reply to Professor Friedman," 86 Geo. L.J. 1045 (1998): "Methodologically, his [Professor Friedman's] definition unwittingly reflects residual traces of hearsay doctrine and tends to slight constitutional text, history, and structure."

[65] Amicus will here make no attempt to discuss or catalogue all the post-*Crawford* cases on the point. Illustrative are such cases as *State v Davis*, 613 SE 2d 760 (SC Ct App, 2005)(containing a useful catalogue of cases); *State v Alvarez*, 107 P 3d 350 (Ct App Az, 2005)(on-scene question not "interrogation" under *Crawford*); *Key v Texas*, --- S.W.3d ----, 2005 WL 467167 (Tex App, 2005)(suggesting that an excited utterance is by definition not testimonial); *Commonwealth v Gray*, 867 A2d 560 (Superior Ct Penn., 2005)(excited utterance in a 911 call made to "obtain the assistance of the police" not testimonial); *Fowler v Indiana*, 809 NE2d 960 (Ct App Indiana, 2005)(on-scene questioning not interrogation; suggests excited utterance cannot be testimonial); *Stancil v United States*, 866 A2d 799 (DC Court of Appeals, 2005)(suggesting a distinction between an excited utterance made in gaining police assistance and one made in reporting a crime); *People v. Conyers*, 777 N.Y.S.2d 274, 277 (N.Y.Sup.Ct.2004)(911 telephone calls to police held not testimonial; assault was still in progress); *People v. Moscat*, 777 N.Y.S.2d 875, 878 (N.Y.City Crim.Ct.,2004)("typical" domestic violence 911 calls not testimonial; "The 911 call--usually, a hurried and panicked conversation between an injured victim and a police telephone operator--is simply *not* equivalent to a formal pretrial examination by a justice of the peace in Reformation England"); *State v Powers*, 99 P3d 1262 (Wash. App, 2004 (911 call reporting crime that had already occurred not testimonial–also not actually an excited utterance under facts of case).

—Examples of cases finding statements testimonial under this "test"

In the Florida case cited earlier,[66] officers responded to a report of a kidnaping and assault. The victim was encountered in a parking lot, nervous and upset; when asked what had happened, he told them a man had abducted him in his own car at gunpoint, and pointed "through his body" to the defendant who was about twenty-five yards behind him in the same parking lot. He also told the officers that the gun used was still in his car. The victim, one Hector Ruiz, was not available for trial, and the case proceeded only on a felon in possession charge. The Florida Court of Appeals found that Ruiz's statement to the police qualified as an excited utterance, but found it inadmissible nonetheless because testimonial. Taking the view that the United States Supreme Court had endorsed each of the three formulations for "testimonial" that it had adverted to in *Crawford*, the court examined each, quickly concluding that the statement was without the first two. But as to the third, the court's shoe-horning is revealing:

> - Many courts have concluded that a hearsay statement made in a 911 call is not testimonial, because the statement is not made in response to police questioning, and because the purpose of the call is to obtain assistance, not to make a record against someone.
>
> - A closer question is presented if the statement was made in response to police questioning at the scene of a crime....Ruiz was excited at the time he made the statement, and that also has a bearing on his expectation regarding the potential use of his statement in court....Whether a statement falls within the third category of testimonial statements identified in *Crawford* depends on the purpose for which the statement is made, not on the emotional state of the declarant.

---

[66] *Lopez v State*, 888 So 2d 693, 698 (Fla Ct App, 2004).

> ...the statement at issue was a testimonial statement. While it is true that Ruiz was nervous and speaking rapidly, *he surely must have expected that the statement he made to Officer Gaston might be used in court against the defendant*....Even in his excitement, Ruiz knew that he was making a formal report of the incident *and that his report would be used against the defendant.*[67]

But while Ruiz might have expected that his report would "be used against the defendant" in that the police would employ it in their investigation of his claims, this is scarcely the same thing as expecting that it "might be used *in court* against the defendant," and this assertion by the court is, plainly put, preposterous. And use of the statement by the police in their investigation is in no way akin to the abuses at which the Confrontation Clause was aimed, as explicated in *Crawford.*

A startling application of this "test" appears in a New York case.[68] An individual called the 911 operator, and the following exchange occurred:

> Operator: Police 1290. Is this emergency?
> Caller: *I just saw a man running with a gun at 138th*
> Operator: What borough?
> Caller: 137 and Cypress. He had a red shirt on ... bald head
> Operator: What borough, sir?
> Caller: Pardon me?
> Operator: What borough is this for?
> Caller: Oh, the Bronx, sorry.
> Operator: The Bronx.
> Caller: Yeah, 137, 138 and Cypress. He's got a red shirt on, hispanic, bald-headed
> Operator: What direction?
> Caller: Towards 138th Street and Cypress.
> Operator: 138th Street and Cypress. What was he wearing?
> Caller: A red shirt and he's bald-headed.

---

[67] 888 So 2d at 699-700 (emphasis added).

[68] *People v Cortes*, 781 NYS2d 401 (NY Sup, 2004).

Operator: A red shirt and he's bald-headed.
Caller: Yeah.
Operator: What about the bottom?
Caller: Eh?
Operator: What about the bottom? What kind of pants? Jeans?
(Noise)
Caller: *Oh, he's shooting at him, he's shooting at him.*
Operator: OK.
Caller: *He's shooting at him.*
Operator: He's chasing the guy, right?
Caller: Yup. (Noise) You hear it?
Operator: I hear it. I hear it. OK.
Caller: *He's killing him, he's killing him, he's shooting him again.*
Operator: He's shooting at him or he shot him?
Caller: *He shot him and now he's running. And he shot him two or three times. Yes.*
Operator: Where's he running to?
Caller: He's running toward 138th Street.
Operator: Hold on, let me get a ambulance on line. Hmmm?
(Ring.)
Male voice: 0709.
Operator: OK. What was that?
Male: 0709.

Caller: I gotta hang up because people, people are gonna think I'm out calling the cops. And they'll think it's me.
Operator: OK. All right sir, no problem. OK. Thank you. I think I got it to relay.[69]

The declarant, not having given his name, was not called at trial, but the tape admitted. The appellate court found this a violation of confrontation under *Crawford*. Because 911 operators are trained in how to gather information from callers reporting crimes that have occurred and also ongoing crimes, the court found the questions of the operator to constitute "interrogation." Further, though the caller was describing a shooting as it happened before his eyes (a paradigm of the present sense impression hearsay exception, as well as the excited utterance), the court concluded that

---

[69] 781 NYS2d at 403-404(emphasis supplied).

> *Crawford* refers to "formal" statements....The procedures in connection with the 911 calls meet the definition of formal. They follow established procedures, rules, and patterns of information collection; *they are conducted in due form*. See *Webster's Third New International Dictionary* (1986). There is a regularized routine to the 911 calls in which crimes are reported....[70]

With regard to application of the "reasonably believe that the statement would be available for use at a later trial" test, the court reached this remarkable conclusion:

> The 911 call reporting a crime preserved on tape is the modern equivalent, made possible by technology, to the depositions taken by magistrates or JPs under the Marian committal statute. Like the victims and witnesses before the King's courts an objective reasonable person knows that when he or she reports a crime the statement *will be used in an investigation and at proceedings relating to a prosecution.*[71]

This is risible (and fortunately stands essentially alone in the post-*Crawford* decisions and literature); it also demonstrates how the itself inappropriate "test" that a statement the declarant should reasonably expect to be used in-court is testimonial is quite often morphed into the quite different test that a statement the declarant should reasonably expect the police to make use of in their investigative efforts is testimonial (and one assumes the police do not take or receive statements simply for their possible amusement value, or to wile away the time).

---

[70] 781 NYS2d at 406 - 407 (emphasis supplied).

[71] 781 NYS2d at 415 (emphasis supplied).

—Examples of cases finding statements nontestimonial under this "test"

Compare the reasoning of an Alaska case.[72] An officer responded to a 911 call from a woman reporting she had been assaulted, but on his arrival she told him that in fact it was someone else who was hurt. She led him to a nearby apartment, where a man was lying on the floor. The officer asked the man what had happened, and he answered that "Joe" had hit him with a pipe ("Joe" was the defendant). This victim was not available at trial, and his statement was admitted as an excited utterance, and this ruling upheld by the Alaska Court of Appeals.

- The finding that Carroll Nelson's statement was an excited utterance, particularly under the facts of this case, appears to be inconsistent with the conclusion that Carroll Nelson was a "witness," as the Supreme Court defined the word in *Crawford, or that his statements were made "under circumstances which would lead an objective witness to reasonably believe that the statement would be available for use at a later trial."*

- We conclude that the out-of-court statement at issue in this case can be deemed non-testimonial even though it was made to a police officer, and even though it directly implicated Anderson....The great majority of courts which have considered this question have concluded that an excited utterance by a crime victim to a police officer, made in response to minimal questioning, is not testimonial.[73]

---

[72] *Anderson v State*, --- P.3d ----, 2005 WL 858773 (Alaska App.,2005).

[73] *Anderson v. State*, 2005 WL 858773, 6. The panel specifically addressed the Florida *Lopez* decision. "The Florida Court's decision apparently stands alone. We conclude that we should follow the emerging majority view on the admissibility of excited responses to brief on-the-scene questioning by police officers."

In an Indiana case[74] an officer responded to a disturbance call at a residence, and spoke to a female, who appeared timid and frightened, but said there was no problem. The officer noticed, however, that the living was in a state of disarray, with broken objects on the floor. The defendant told the officer that there had been an argument but it had not become physical, and was now resolved. The officer prudently separated the victim from the defendant, and once separated the victim told the officer the defendant had attacked her, throwing her down and punching her. The victim did not testify at trial, and the statement to the officer was admitted. The court found that the requirements for an excited utterance were met—the observations of the officer inside the residence corroborated the point. It is also found the statement nontestimonial.

- It appears to us that the common denominator underlying the Supreme Court's discussion of what constitutes a "testimonial" statement is the official and formal quality of such a statement.

- A.H.'s oral statement was not given in a formal setting even remotely resembling an inquiry before King James I's Privy Council.

- ....police "interrogation" [under *Crawford*] is not the same as, and is much narrower than, police "questioning." "Interrogation" is defined in one common English dictionary as "To examine by questioning formally or officially."...Whatever else police "interrogation might be, we do not believe that word applies to preliminary investigatory questions asked at the scene of a crime shortly after it has occurred.

---

[74] *Hammon v State*, 809 NE2d 945 (Ind App, 2004).

—Conclusion

The cases after *Crawford* often take different approaches, and reach wildly divergent results, because the framework employed is, for the reasons given by Justice Thomas in his concurring opinion in *White v Illinois*, noted previously, incoherent and problematic. This court should set its face against the "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial" as a test for "witnesses against" as unworkable and, perhaps even more importantly, unjustified by the text and history of the Confrontation Clause.

(3) The Confrontation Clause was not designed to "freeze" the law of hearsay

Counsel for the defendant in the Nicholas Jackson case at issue here claims that "the excited utterance or spontaneous declaration heresay (sic, hearsay) exception did not exist in 1791," and so "that exception cannot be utilized now" to justify admission of uncross-examined statements made to the police.[75] This is the view that the Confrontation Clause is simply a "super-hearsay" rule, incorporating whatever the law of hearsay was in the 1790's. But the Court itself has rejected this way of looking at the Confrontation Clause.

One view of the Confrontation Clause, sometimes called the "Wigmore-Harlan view" (though Justice Harlan later retreated from it), is that the Confrontation Clause simply requires that "so far as testimony is required under the hearsay rule to be taken infrajudicially, *it shall be taken in a*

---

[75] Appellant's Brief, p. 20. Of course, if this view were correct, it would mean that admission of *any* uncross-examined statement from an unavailable declarant under a hearsay exception that did not exist at the time of ratification of the 6th Amendment (including excited utterances made to ordinary citizens) is barred by the Confrontation Clause. *Crawford* said no such thing.

certain way, namely, subject to cross-examination–not secretly or ex parte away from the accused. The Constitution does not prescribe what kinds of testimonial statements (dying declarations or the like) shall be given infrajudicially–this depends on the law of evidence for the time being–but only what mode of procedure shall be followed–i.e., a cross-examining procedure–in the case of such testimony as is required by the ordinary law of evidence to be given infrajudicially."[76] As Justice Thomas has observed, this view "finds support in the plain language of the Clause."[77] But though textually supported, this view is contrary to the history of the evolution of the Confrontation Clause. A second approach, which governed in at least some sense for several decades before *Crawford*, views all unavailable hearsay declarants to be "witnesses against" a defendant, but allows the hearsay depending on whether the circumstances surrounding its making would afford the trier of fact a substantial basis on which to assess its reliability. The assumption that *all* unavailable hearsay declarants are "witnesses against" the accused is, as Justice Thomas also pointed out in *White v Illinois*, "an assumption that is neither warranted nor supported by the history or text of the Confrontation Clause," and cannot be said to have survived *Crawford.*

Crawford rejects the Wigmore-Harlan view that the Confrontation Clause simply requires that as to that testimony the law of evidence requires be given in court, that evidence must be taken subject to cross-examination; it also rejects the view that all out-of-court declarants are "witnesses against" the accused within the meaning of the clause, as that view would eliminate any and all hearsay exceptions, and is both atextual and ahistorical. The Confrontation Clause was not meant

---

[76] 5 J. Wigmore, *Evidence* § 1397, p. 159 (J. Chadbourn rev. 1974) (footnote omitted; emphasis modified).

[77] *White v. Illinois,* 502 U.S. 346, 359-360, 112 S.Ct. 736,744 - 745 (1992)

to simply bar all hearsay other than then-recognized exceptions, thereby freezing the law of evidence in this regard (and at a fairly early stage of its development). There is strong evidence, in fact, to the contrary.

As a particularly esteemed former Solicitor General of the United States has put it, the Confrontation Clause "was to be interpreted in light of the law as it existed at the time of the adoption of the sixth amendment, and that law recognized exceptions to the hearsay rule. The Confrontation Clause had a purpose, clearly, but it was not designed to freeze the law of evidence or to exclude all hearsay evidence."[78] Three and a half decades before *Crawford* the Supreme Court itself rejected the notion that "the Confrontation Clause is nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically at common law."[79] One commentator has explained that an "incorporation of hearsay rules" approach would require that any development of the law of hearsay come only through constitutional amendment; instead, however, there "are more than a few plausible historical reasons to conclude that the Framers left the

---

[78] Erwin N. Griswold, "The Due Process Revolution and Confrontation," 119 U. Pa. L. Rev. 711, 714 (1971).

[79] *California v Green*, 399 US 149, 155 (1970). Note, for example, that a good 70 years after the adoption of the Sixth Amendment Professor Greenleaf, in his renowned evidence treatise, refers to statements that are "part of the res gestae" as being original evidence, and not hearsay at all, discussing what today would be the exceptions for present sense impression, statements of mental condition, such as intent, and statements of physical condition. See 1 Greenleaf, *The Law of Evidence*, §§ 98-114, § 123 (H.O. Houghton, 1863). With regard to hearsay exceptions, the treatise refers only to statements concerning reputation; statements concerning ancient possessions; declarations against interest; dying declarations; prior recorded testimony; and admissions and confessions. See 1 Greenleaf, Chapters VI-XII.

admissibility of hearsay to the law of evidence,"[80] save a particular kind of hearsay—uncross-examined *formal statements taken by the government.*

(4) Testimonial statements are marked by formality

The Framers were "a group of lawyers and statesmen who were familiar with the evolutionary process by which common-law courts developed and modified the rules of evidence generally and the hearsay rules in particular."[81] The only lesson from history is that, as *Crawford* says, it was the purpose of the Confrontation Clause to prevent the Government from trying an accused by ex parte affidavits and depositions. The opinion also says that the Confrontation Clause "applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations....[because][T]hese are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed." The task, then, is to see if there *are* any modern practices with a close kinship to the ex parte examinations by magistrates beyond those identified in *Crawford.* The task is *not* to determine whether a particular hearsay exception was, in its modern form, embraced at the common-law at the time of the ratification of the Sixth Amendment. An insight of Professor Keith Whittington expressed in his brilliant exposition on constitutional interpretation[82]—that the Constitution "supports not only what its text requires but also much that it merely suggests or allows"—means that faced with a question of meaning such as that

---

[80] John G. Douglass, "Beyond Admissibility: Real Confrontation, Virtual Cross-examination, and the Right to Confront Hearsay," 67 Geo. Wash. L. Rev. 191, 240 (1999).

[81] Douglas, at 240.

[82] Keith Whittington, *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review* (University Press of Kansas: 1999).

involved here, a court must not "strike down every government action that cannot be justified in originalist terms but only those that are *inconsistent* with known constitutional requirements."[83] It is not required that the law of hearsay as it now exists be shown to have been *embraced* by the common law of evidence at the time of the ratification of the Sixth Amendment, but only that any evidentiary principle now at issue is not *inconsistent* with that which was intended to be prohibited by the Confrontation Clause.

Admission at trial of the results of government interrogation without presentation of the declarant, be it of suspects or witnesses, amicus submits, constitutes the universe of practices sought to be precluded by the Confrontation Clause—along with governmentally acquired affidavits or depositions, prior testimony at a preliminary hearing, before a grand jury, or at a former trial—that are akin to the practice of admission at trial of ex parte pretrial examinations of witnesses by magistrates. This result is reached by examining the "common nucleus" of these various statements. That common nucleus has been mistakenly identified by some courts in the following manner:

> We conclude that the "common nucleus" ... centers on the reasonable expectations of the declarant. It is the reasonable expectation that a statement may be later used at trial that distinguishes the flippant remark, proffered to a casual acquaintance...from the true testimonial statement.
>
> *****
>
> we believe an objective test focusing on the reasonable expectations of the declarant under the circumstances of the case more adequately safeguards the accused's confrontation right and more closely reflects the concerns underpinning the Sixth Amendment....Thus we hold that a statement is testimonial if a reasonable person in the position of the

---

[83] Whittington, at 172, 211 (emphasis supplied).

> declarant would objectively foresee that his statement might be used in *the investigation* or prosecution of a crime.[84]

The 10th Circuit has, amicus submits, misapprehended the clues available in *Crawford*; further, inclusion of an objective belief by the declarant that the statement might be used in the *investigation* of a crime is wholly unrelated to the taking by magistrates of pretrial depositions for use at trial in lieu of testimony from the declarant.[85] Closer to the mark is this conclusion by the Maryland Supreme Court:

> these standards share a common nucleus in that *each involves a formal or official statement made or elicited with the purpose of being introduced at a criminal trial. [Crawford]*, n. 7 (finding that statements are testimonial where "government officers [are involved] in the production of testimony with an eye toward trial"). Although these standards focus on the objective quality of the statement made, the uniting theme underlying the *Crawford* holding is that *when a statement is made in the course of a criminal investigation initiated by the government*, the Confrontation Clause forbids its introduction unless the defendant has had an opportunity to cross-examine the declarant.[86]

A close examination of *Crawford*, as well as its precursor, the concurring opinion of Justice Thomas joined by Justice Scalia in *White v Illinois*, reveals that it is the Maryland Supreme Court and not the 10th Circuit that is on the right path.

The path to *Crawford* begins with *White*, a case decided under the Confrontation Clause view overturned by *Crawford*. A child's babysitter heard the child scream in the night, and rushed to the

---

[84] *United States v Summers*, --- F.3d ----, 2005 WL 1694031 (CA 10, Jul 21, 2005)(emphasis supplied).

[85] And, for reasons previously stated, the test is unworkable and makes no sense.

[86] *State v. Snowden*, 867 A.2d 314, 324 (Md.,2005)(emphasis supplied).

child's bedroom. He saw defendant, someone he knew, and knew to be a friend of the child's mother, leaving. The child told the babysitter about the assault, and that defendant had threatened to hurt her if she screamed. When the child's mother arrived home some 30 minutes later, she asked her daughter what had happened, and she repeated her story. The child appeared "scared" and a "little hyper." The mother called the police, and approximately 45 minutes from the time the screams first aroused the babysitter an officer arrived and questioned the child, who told her story again. Four hours after the child's scream had brought the babysitter to the room the child was examined by a nurse and then by a doctor at a hospital. Again the child recounted the events.

The child did not testify at trial; though she appeared, she was emotionally overwrought and unable to take the stand. The babysitter, the child's mother, the police officer, and the nurse and doctor all testified over objection to the child's statements to them on the ground that they were excited utterances, save the statement to the nurse and doctor, which was admitted under the exception for statements in the course of securing medical treatment. Applying then-extant principles, the Supreme Court affirmed, finding the statements sufficiently reliable.[87] Justice Thomas, joined by Justice Scalia, expressed a different view, one pointing toward *Crawford.*

Justices Thomas and Scalia suggested that the "relevant historical materials" point to a "narrower reading of the Clause that the one given to it since 1980...."[88] They concluded that there is "little if any indication in the historical record that the exceptions to the hearsay rule were understood to be limited by the simultaneously evolving common-law right of confrontation," and

---

[87] The prevailing test at the time being, of course, *Ohio v Roberts*, 448 US 56, 100 S Ct 2531, 65 L Ed 2d 597 (1986).

[88] 112 S Ct at 745.

found that the then-current Confrontation Clause standards had "no basis in the text of the Sixth Amendment."[89] In addition to finding problematic a test for "testimonial" statements based on the contemplation of the declarant of future legal proceedings at the time of the making of the statement, adverted to previously, the concurring opinion focused as an alternative on *formal* materials:

> One possible formulation is that...the Confrontation Clause is implicated by extrajudicial statements *only insofar as they are contained in formalized testimonial materials*, such as affidavits, depositions, prior testimony, or confessions....[for] [I]t was this discrete category of testimonial materials that was historically abused by prosecutors as a means of depriving criminal defendants of the benefit of the adversary process...and under this approach, the Confrontation Clause would not be construed to extend beyond the historical evil to which it was directed.[90]

Thus, the concern of the concurring opinion of Justices Thomas and Scalia was that the Confrontation Clause was being read too broadly, not too narrowly, and they looked to two features shared by materials the admission of which without cross-examination the Confrontation Clause was aimed to prohibit: 1)governmental action; and 2)a formalized setting in the obtaining of the material. Justice Scalia authored *Crawford*, in an opinion fully joined by Justice Thomas, and the opinion signals no retreat from these concerns.

As with Justice Thomas's concurring opinion in *White*, Justice Scalia reviewed the relevant historical materials concerning the evil at which the Confrontation Clause was aimed, concluding that the principal evil the Clause was designed to prevent was "ex parte examinations as evidence

---

[89] 112 S Ct at 746.

[90] 112 S Ct at 747 (emphasis supplied).

against the accused."[91] "Reliability" of out-of-court statements from unavailable declarants as a general matter was *not* the concern of the Clause; unreliable off-hand remarks are not within the Clause (though ordinarily inadmissible under the law of evidence), and quite reliable ex parte examinations of unavailable declarants are within the Clause, even if the law of evidence developed some exception to permit them.[92] The text of the Clause itself, said the Court, reveals its focus, for it applies to "witnesses" against the accused, and these are those who "bear testimony," which in itself is typically a "*solemn declaration* or affirmation made for the purpose of establishing or proving some fact...[A]n accuser who makes a *formal statement* to *government officers* bears testimony in a sense that a person who makes a casual remark to an acquaintance does not."[93] Again, the emphasis is on 1)governmental activity in the taking of the statement, and 2)the solemnity or formality of the occasion in which this is done. And the Court readily concluded that interrogation of a criminal suspect by the police is sufficiently akin to the common-law practice of ex parte examination as to fall within the Confrontation Clause, emphasizing that the statement of Crawford's wife was given "in response to *structured* police questioning." This adds a third component; the statement must not only be made to a governmental agent, but in response to interrogation—to "structured" police questioning—questioning designed to obtain evidence. If any of these components is missing, the statement is not testimonial. That is, if the statement is not made to a governmental official, then no matter the degree of its solemnity or formality it is not within the Confrontation Clause; on the other hand, if it *is* made to a governmental official, but is not the result

---

[91] *Crawford*, 124 S Ct at 1363.

[92] *Crawford*, 124 S Ct at 1364.

[93] 124 S Ct at 1364.

of interrogation—of structured police questioning—or is not solemn or formal, it remains without the Clause. The historical record reveals no concern with either the subjective or objective beliefs of the *declarant* as to the use to be put to a statement made to a governmental official[94]—and certainly not a belief that it would be put to use in investigating a crime—it reveals an abhorrence with the *gathering* of evidence in this manner by *the government* for use at trial without presenting the declarant for cross-examination.

In sum, amicus submits that an out-of-court statement is testimonial if:

- it was made to a governmental official or officials, who
- acquired it through structured questioning, and it was
- made in a formal or solemn manner.[95]

(5) <u>An excited utterance, even one made to the police, is not testimonial</u>

(a) <u>Historical background</u>

At the time of the ratification of the 6th Amendment, and on into the 1800's, "the understanding of what is and what is not hearsay was not well developed and the various exceptions

---

[94] If a governmental official took a formal statement from a witness with explicit oral and written assurances that the statement would not be used at any trial, this would certainly both subjectively and objectively justify the declarant in so believing, but the statement would nonetheless be testimonial (and as amicus has argued earlier, even witnesses giving formal statements do not ordinarily have *any expectation at all* that their statements will be admitted in court against the accused; if anything, they expect that the information they are supplying may well lead to the government calling them as witnesses at trial to present this information to the factfinder).

[95] Points 2 and 3 will doubtless generally merge, though not always.

to the hearsay rule were not clearly defined."[96] An amalgam of exceptions—and statements not hearsay at all—came to be called "res gestae" statements. Wigmore has said of the "res gestae exception" that one might well approach its exposition "with a feeling akin to despair," for there has been "such a confounding of ideas, and such a profuse and indiscriminate use of the shibboleth res gestae, that it is difficult to disentangle the real basis of the principle involved."[97] But at least a form of what today is known as the "excited utterance" or "spontaneous declaration" exception appears to have been part of this conglomeration early on, though not known by modern terms; Greenleaf's eleventh edition of his treatise in 1863, for example, makes no mention of the "excited utterance," referring to the "res gestae."[98] The "spontaneous declaration" part of the "res gestae" amalgam, which came to be known as the excited utterance, first seems to have developed as an exception permitting the declaration of one who had been injured made "immediately upon the hurt received, and before [the declarant] had time to devise or contrive anything for her own advantage....",[99] and may only have extended to the person injured and not someone observing the incident. There thus may have been no excited utterance exception to the rule against admission of hearsay at the time of the ratification of the 6th Amendment other than as applied to the victim of some hurt or injury. Over time, however, the excited utterance developed as a distinct exception applicable to a statement made by any person, where there had been some event so startling as to render normal reflective thought processes "inoperative," and where the statement was made as a reaction to that event and

---

[96] McCormick, *Evidence* (2nd ed., 1972), § 288, p. 686.

[97] VI Wigmore, *Evidence* (Chadbourn Revision), § 1745, p. 191-192.

[98] 1 Greenleaf, *Evidence* (11th ed., 1863), § 108, p. 148.

[99] *Thompson v Trevanion*, Skin. 402, 90 Eng rep 179 (K.B.: 1694).

not as a matter of reflection.[100] Initially, it appears, "immediacy" was required; that is, the statement had to have been made immediately upon observation of the startling event, but this requirement was a result of a confusion of the exception with verbal-act principles, and it became clear that the declaration was not required to be contemporaneous with the event, but rather made when the declarant was still under the influence of the excitement caused by the event.[101]

As the exception is now understood, the focus of the admissibility inquiry is on the lack of capacity to fabricate, not the lack of time to fabricate. Certainly the length of time that passes after the event and before the statement is an important factor in the inquiry, but it is a factor to be judged in the context of the nature of the startling event (some startling events are more startling than others), and the response of the declarant to that event; that is, whether the declarant, at the time of the statement, remains under the influence of its startling nature. This may be judged, at least in part, from manifestations of the declarant, which allow the conclusion that he or she remains under the stress of the event.[102]

It was on this rationale that this court upheld the admission as an excited utterance of a statement made by a 16-year-old boy some ten hours after the startling event. The victim had been befriended by a 31-year-old bodybuilder. One evening the defendant would not allow the victim

---

[100] McCormick, § 297, p. 704.

[101] Wigmore, § 1756, p. 230-231. Note that closeness in time is more strictly required with regard to the modern understanding of the present sense impression hearsay exception, which does not require that the event described be startling., but instead that the statement describing it be made as the event is occurring or *immediately* thereafter.

[102] *People v. Layher*, 238 Mich.App. 573, 583 (1999); *People v. Walker*, 265 Mich.App. 530, 534 (2005).

to leave the defendant's apartment, and became increasingly angry with the victim. The defendant finally gave the complainant the option of fighting him, or allowing defendant to perform fellatio on him. The threats to the victim intensified, and when the defendant held scissors to his neck to force compliance, the victim game in. The victim arrived home at approximately 1:45 in the morning, and when his mother asked if anything was wrong, replied "Oh, mom, leave me alone." He seemed tearful and emotional.

> The mother observed complainant pacing the floor and punching his hand into his fist. She testified further that at approximately 5:30 a.m., complainant was uncharacteristically sleeping on the livingroom couch, though his bedroom was adjacent to the livingroom, and that his eyelashes appeared wet. At 11 o'clock the next morning complainant awoke. He testified that he asked his father for a weightlifting bench, and that his father responded, "Maybe later." Later he asked his mother, who said she would buy him a bench for his birthday in June. His mother testified that at that moment complainant stated, "Mom, I can't wait that long," and started crying and rocking back and forth. She further testified that when she asked him what was wrong, he responded, "Oh, mom, I had to be sucked off last night before I can [sic] even come home."[103]

This court reversed the holding of the Court of Appeals that the passage of almost ten hours rendered the statement inadmissible, even though that court found that the victim was still under the stress of the assault. Distinguishing the immediacy required by the present sense impression exception, MRE 803(1), this court found that because the circumstances showed that the victim was still under the stress of the exciting event, the foundational requirements of the rule had been satisfied, and the statement was properly admitted.[104]

---

[103] *People v. Smith*, 456 Mich. 543, 545-549 (1998).

[104] 456 Mich at 551-552.

(b) A statement satisfying the excited utterance foundation is not testimonial

That the excited utterance exception may not have existed, at least in its current form, at the time of the ratification of the 6th Amendment is not the point here;[105] what matters is whether the modern understanding of the exception—as it is applied to excited utterances made to governmental officials—is contrary to the prohibition of the Confrontation Clause. An excited utterance made to someone other than a governmental official raises no Confrontation Clause issues.[106] Both the wrong approach, and the correct approach, in considering excited utterances to governmental officers (either at the scene when officers respond, or through 911 emergency calls) are revealed in a recent opinion of the 6th Circuit Court of Appeals.

---

[105] Amicus would note the important observation made by Professor Thayer with regard to the construction of hearsay exceptions in general:

> It seems a sound general principle to say that in all cases a main rule is to have extension, rather than exceptions to the rule; that exceptions should be applied only within strict bounds, and that the main rule should apply in cases not clearly within the exception. But then comes the question, what is the rule, and what are the exceptions? There lies a difficulty. A true analysis would probably restate the law so as to make what we call the hearsay rule the exception, and make our main rule this, namely, that whatsoever is relevant is admissible To any such main rule there would, of course, be exceptions; but as in the case of other exceptions, so in the hearsay prohibition, this classification would lead to a restricted application of them, while the main rule would have freer course.

Thayer, *A Preliminary Treatise on Evidence* (Little, Brown, and Co, 1898), p.522.

[106] That the statement must be to a governmental officer of some sort is not a matter of debate. See e.g. *United States v. Gibson,* 409 F.3d 325, 338 (CA 6,.2005); *United States v. Manfre,* 368 F.3d 832, 838 n. 1 (CA 8,2004); *United States v. Lee,* 374 F.3d 637, 645 (CA 8.2004); *United States v. Saget,* 377 F.3d 223, 229 (CA 2, 2004).

Without belaboring the facts of the case, suffice it to say that the majority in *United States v Arnold*[107] was of the view that a 911 call there was testimonial because *any* statement made to government officials is testimonial under *Crawford*, this being the *only* question involved in the inquiry, the majority saying that "Gordon [the declarant] made the statements to government officials: the police. *This fact alone indicates that the statements were testimonial.*"[108] This "reasoning" ignores references in *Crawford* to the formality of the occasion, to the solemness of the statement, and to the need for the statement to have been the result of interrogation (even with that term employed, as said in *Crawford*, in its "colloquial" rather than technical sense, meaning simply that the Court was not referring to the definition of interrogation applicable to the issue of when *Miranda* warnings are applicable,[109] which applies only to persons in custody, and would have no application at all to witnesses).

That the statement was to a government official is the starting point not the ending point of the analysis. *Crawford* refers to interrogation "colloquially"—in its everyday sense. The *Merriam-Webster Dictionary* defines "interrogate" as "to question formally and systematically." Lexicographer Bryan Garner says that the term "suggests formal or rigorous questioning."[110] And *Blacks Law Dictionary*[111] (7th ed, 1999) defines "interrogation" as "the formal or systematic

---

[107] *United States v. Arnold,* 410 F.3d 895 (CA 6, 2005).

[108] *United States v. Arnold,* 410 F.3d at 903.

[109] See *Rhode Island v Innis*: (interrogation of a suspect in custody occurs through questions or statements that are reasonably likely to elicit an incriminating response; clearly, this cannot be the test for interrogation with regard to ordinary witnesses).

[110] Garner, *A Dictionary of Modern Legal Usage* (2nd ed, 1995), p. 463.

[111] *Blacks Law Dictionary*, (7th ed, 1999).

questioning of a person." With regard to 911 calls, or statements made to the responding police officers at the scene, where the statement at issue satisfies the foundational requirements of the excited utterance exception—and not all such statements will—it is by definition nontestimonial; no distinction can be made regarding whether the purpose of the statement is to report a crime that has just occurred, or to request assistance during an ongoing crime, as some cases have done. The question is whether the statement is or is not an excited utterance (or present sense impression, if the statement describes an event as it is occurring or *immediately* thereafter).

Judge Sutton's dissent in *Arnold* is precisely correct; amicus cannot improve upon his remarks, set forth below:

> ■ In my view, this 911 call, and indeed most 911 calls, should be treated as non-testimonial. An emergency call does not naturally satisfy the Court's definitions of "testimonial" evidence—either because it is *not a "solemn declaration or affirmation made for the purpose of establishing or proving some fact" in a court of law*,..., or because it is not a statement that "declarants would reasonably expect to be used prosecutorially,"....[112]
>
> ■ As in this case, a 911 call generally will be a plea for help, not an effort to establish a record for future prosecution. *A 911 call represents a backward-looking response to an emergency that has already occurred or a contemporaneous response to an emergency that is occurring, not a forward-looking statement about a criminal prosecution that may or may not occur.*
>
> ■ Such calls also bear poor analogies to the kinds of testimonial statements that the Court has said will traditionally qualify—"affidavits, depositions, prior testimony, or confessions,"....

---

[112] It should be noted that Judge Sutton was not endorsing this latter test, which, for reasons stated previously, amicus submits is completely off the mark and should never be employed.

*****

- While this approach likely will mean that most 911 calls will be admissible, it does not mean that all of them will be admitted. There may well be situations where the 911 call is not far removed from a deliberative statement to investigating officers or where, to borrow a phrase from Professors Friedman and McCormack, it amounts to nothing less than "dial-in testimony."... Richard D. Friedman & Bridget McCormack, *Dial-In Testimony,* 150 U. Pa. L.Rev. 1171 (2002). District court judges are well equipped to determine on a case-by-case basis whether such an exception ought to apply, and we are well equipped to ensure that in the general run of cases "dial-in testimony" is not being admitted.

- In considering this issue, I cannot resist commenting on the nexus between the "excited utterance" inquiry and the "testimonial" inquiry. When a district court finds that a 911 call "relate[s] to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition"—when in other words the trial judge finds that the call qualifies as an excited utterance under Rule 803(2) of the Federal Rules of Evidence—it often would seem to be the case that the call is not testimonial in nature. *It is very difficult to imagine a "solemn" excited utterance or even a semi-solemn excited utterance.*

- Any statement that takes on the qualities that the Court has ascribed to the definition of testimonial evidence (a "solemn declaration ···," *Crawford,* 541 U.S. at 51, 124 S.Ct. 1354) or to agreed-upon forms of testimonial evidence ("affidavits, depositions, prior testimony, or confessions," *id.* at 51–52, 124 S.Ct. 1354) would seem to depart from the prerequisites for establishing an excited utterance. *To respect the one set of requirements would seem to disrespect the other. In the end, the number of "solemn" statements that also happen to "relate to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition" may be something approaching a null set.*[113]

---

[113] *United States v. Arnold,* 410 F.3d at 913-915 (emphasis added). See also *United States v. Manfre,* supra, 368 F.3d at 838 ("Mr. Rush's comments were made to loved ones or acquaintances and are not the kind of memorialized, *judicial-process-created* evidence of which *Crawford* speaks"), emphasis supplied.

To determine whether a statement is testimonial within the meaning of *Crawford*, so as to be barred from admission at trial by the Confrontation Clause unless the declarant testifies or the statement was subject to cross-examination when taken, a reviewing court should ask whether the statement was made to a governmental official, as a result of formal or systematic questioning, and given in a solemn or deliberate manner.

E. Conclusion

The declarant here certainly experienced a startling event when he walked into a bedroom at 2:30 in the morning and observed his nine-year-old son performing fellatio on his nineteen-year-old stepson, both being naked. Within six hours (compare the ten-hour period in *Smith*), Mr. Hines appeared at the police station to report the event. In so doing, he was "very emotional"; at times he cried. The trial judge concluded that the foundational requirements of MRE 803(2) were met, and the Court of Appeals found no abuse of discretion. Contrary to assertions of the defendant, there is no indication of any "structured police questioning"; indeed, there are hardly any indications of questioning at all. The police were not building a case, or even yet investigating; the officer was receiving a report. Both because the statement was an excited utterance, and by definition, as Judge Sutton as noted, not "solemn" or formal, and because it was not the result of formal or structured questioning, it was not testimonial. The written narrative by Mr. Hines, even if not admissible as an excited utterance if it were to be found that he had composed himself by that time, was not the result of structured police questioning, but a reiteration of his earlier statement. If it was not admissible as an excited utterance, neither was it testimonial. Its admission might be evidentiary

error, but it was not constitutional error, and given the proper admission of the excited utterance, it was harmless.

The Confrontation Clause was designed to have a limited, though extremely important, role. A particular practice, that of the government gathering evidence through ex parte depositions and affidavits, and then admitting that evidence at trial without presenting the witnesses, was banned. Those modern practices which are closely akin this banned civil-law practice are also prohibited, so that when the government engages in formal or structured questioning of an individual, who "bears witness" with a solemn or formal statement, that testimonial statement is inadmissible under the Confrontation Clause unless the declarant testifies (and the out-of-court statement may remain barred by rules of evidence, but the Confrontation Clause has nothing to say on the point). The law of evidence, especially hearsay exceptions, was not well developed at the time of the ratification of the 6th Amendment, and the policy considerations concerning whether certain hearsay exceptions should be created or even expanded is not one with which the Confrontation Clause is concerned, outside of the evil it was designed to prevent.[114] Much hearsay falls without the Confrontation Clause and also without any hearsay exception; that it is not barred by the Confrontation Clause does not render it admissible. In this State the keeper of the Rules of Evidence is this court, which is well able toallow the law of evidence to develop and be revised while remaining within the strictures of the

---

[114] In *Crawford* Justice Scalia suggests that there may be some "tension" between *Crawford* and the majority opinion in *White*, noting that the spontaneous declaration exception may not have existed at all at the time of the ratification of the 6th Amendment. This discussion was, of course, dicta, and is scarcely an exploration of the relationship between excited utterances, when made to a governmental officer, and the Confrontation Clause. Amicus believes Judge Sutton's view would (and if necessary will) carry the day when and if the issue reaches the Supreme Court.

Confrontation Clause. Where the statement made by a declarant not testifying at trial was not testimonial in that it was not to a governmental agent; or if to a governmental agent, not the result of structured or formal questioning (as in a response to an arriving police officer's question, "what happened here?"); or if itself not solemn or formal but within an exception such as the excited utterance or present sense impression, the question is solely one of policy and not constitutional law.

II.

Extrinsic proof of prior bad acts bearing on untruthfulness is not permitted under Rule 608, though cross-examination may be allowed. A claim that a victim in a criminal sexual conduct case has made previous unrelated false claims of sexual assault falls squarely within Rule 608, so that extrinsic proof is prohibited. Before cross-examination is permitted the defendant must show by proof that is virtually dispositive that a prior allegation was made and that it was false.

This court's order granting leave to appeal specifies several issues concerning alleged prior false claims of sexual assault by the victim:

- whether the trial court erred when it applied the rape-shield statute...and denied defendant an opportunity to present testimony regarding his allegations that the complainant had made a prior false allegation of sexual abuse against a different individual. See *People v Hackett....*;

- whether alleged prior false allegations constitute "specific instances of the victim's sexual conduct" as contemplated by the rape-shield statute;

- what procedural and evidentiary requirements must be met to prove that the allegations are false and for the admission as evidence at trial; and

- if the trial court did err in excluding or admitting evidence, whether any evidentiary or constitutional errors were harmless.

Amicus will argue that the controlling principle of law here is contained in MRE 608, and that, in regard to alleged prior false claims of sexual assault, MRE 608 and rape-shield principles

coalesce. That is, if the alleged false claim of a prior sexual assault is determined by the trial judge *not* to be false, then both Rule 608 as well as the rape-shield provisions prohibit either questioning or evidence regarding the prior assault, the rape-shield provisions because involved is then a prior sexual act (albeit nonconsensual), and Rule 608 because since the claim is true rather than false it is not relevant to untruthfulness and defendant's theory of admissibility disappears. Similarly, if it is determined by the trial judge that the allegation that a prior claim of sexual assault was even *made* is insufficiently supported, no cross-examination or extrinsic proof can be permitted, as there can be no relevance under Rule 608 if no claim, false or otherwise, was ever made. Finally, if the trial judge determines that the allegation of a false claim *is* sufficiently supported,[115] Rule 608 permits only cross-examination, prohibiting any extrinsic proof on the matter. Procedurally, then, in order for the trial judge to make these determinations, notice as provided in the rape-shield statute should be provided and an in camera hearing held. Alternatively, simply as a foundational matter under Rule 608 an in camera hearing is required, where the proponent of the evidence must make the necessary evidentiary showing. Either way, one comes out the same place.

A **Michigan Case Law**

This court's order refers to *People v Hackett*,[116] and thus it is with that case amicus begins. *Hackett* is a rape-shield case. It involves issues of admissibility of prior specific acts of the victim and reputation of the victim, but in neither *Hackett* nor its jointly decided companion case is the question of admissibility of alleged prior false claims of sexual assault presented. Justice Boyle's

---

[115] See section C.,infra, for argument as to the appropriate foundation.

[116] *People v Hackett*, 421 Mich 338 (1984).

statement in the case, made in passing, that "the defendant should be permitted to show that the complainant has made false accusations of rape in the past"[117] is dicta.[118] What of cases preceding *Hackett*?

In a case decided over a century ago, the defendant, one Evans, was charged with the rape of his daughter, a girl of 14 years. The child was asked on cross-examination if she had not made charges of the same nature against other men who were perfectly innocent. On objection, the trial court allowed the answer, but noted to counsel that he would be bound by the answer. The victim answered, "no." Defense counsel attempted to admit evidence that the girl had made accusations of a similar nature against her brothers which were untrue, and also against other persons. Though the trial judge allowed the questions, he again held that extrinsic proof was not permitted, finding the matter to be collateral. This court found error:

---

[117] *Hackett*, at 348-349.

[118] *Hackett* cites *People v Werner*, 221 Mich 123 (1922), but the case is not a "false claim" case. Rather, the question in *Werner* went to what today would be termed the "source of injury." As confirmation of rape, the doctor testified that the victim had a ruptured hymen. To counter this evidence, the defense wished to show that the victim had had intercourse with other men. The trial judge allowed cross-examination but not extrinsic proof, and this court found error because "[S]pecific acts with others than defendant may be shown to rebut corroborating circumstances, as when the woman is pregnant or has miscarried or given birth to a child, or where she was infected with veneral (sic) disease, or where a physician has testified that the hymen was reputured"(sic). This principle is carried forward under the rape-shield provisions. The court did note in passing that under *Evans* evidence that a rape complainant has "made similar charges against others may be shown," but this remark was made as the court was holding that certain allegedly obscene material—the content of which was not revealed in the opinion—that defendant claimed the victim had written (she denied it) and which the trial judge refused to admit could not "be said to indicate a mania for accusing men of rape, or that it is of a nature to indicate such a morbid condition of mind or body as justified its reception." 221 Mich at 127.

> ...[the jurors] ought to have been made acquainted...with the mental and moral qualities of the girl. If she was accustomed, and had on numerous occasions, as claimed by counsel for respondent, made statements charging, not only her brothers, but numerous other men of that community, with other similar offenses, and then admitted the falsity of such charges, it would have a tendency to show a morbid condition of mind or body, and go a long way in explaining this charge....It is claimed that the testimony offered would tend to show that she was the subject of hallucinations upon this subject, and is in its nature independent evidence, and in no sense collateral.[119]

That the case, and the principle expressed, are from a by-gone time, is revealed by its reliance on a holding by Justice Cooley writing for the court in *Derwin v. Parsons.*[120] In an assault and battery tort case, the court said that "[T]o the question whether [the victim] had not made charges similar in nature against two other persons objection was made, but we have no doubt it was proper to allow them, and also to prove the facts if she denied having made the charges. The probability that a woman who conducts herself properly will be frequently assaulted is very small, and every new complaint therefore tends to cast doubt upon those which preceded it." This quaint notion ("the probability that a woman who conducts herself properly will be frequently assault is very small") belongs to a different age and is now outmoded; this statement was made, after all, at a time when rape trials were governed by principles which have in more modern times been repudiated, as evidenced by this instruction, unexceptionable at the time: *"First.* 'The jury must be satisfied the

---

[119] *People v Evans*, 72 Mich 367, 380 (1888). See also *People v Wilson*, 170 Mich 669, 671-673 (1912), where the defense wished to cross-examine the victim regarding alleged prior false claims of rape made against three different men (the victim allegedly having admitted the falsity after making the accusations), and also to admit the extrinsic evidence, in order to show that the victim was "subject to hallucinations in making charges of this kind," this court finding error in the failure to allow the proof under *Evans*.

[120] *Derwin v. Parsons* 52 Mich. 425, 427 (1884).

connection was had by force, against the will of the prosecutrix, and that there was the utmost reluctance on her part; otherwise, they must acquit the defendant.' *Second.* 'if the jury have any reasonable doubt as to whether the complaining witness made as much resistance as she could have done, either by physical resistance or outcry, then they must acquit.'"[121]

The more modern Michigan "false accusation" cases fail to take note of the promulgation in this state of an evidence code. These cases simply make the statement that "[I]n a prosecution for a sexual offense, the defendant may cross-examine the complainant regarding prior false accusations of a similar nature and, if she denies making them, submit proof of such charges,"[122] citing the earlier cases. But this "principle" does not, with regard to extrinsic proof, survive the promulgation of the Michigan Rules of Evidence, and as to cross-examination both those rules and the rape-shield provisions require certain procedural protections by way of foundation.

---

[121] *People v. Crego*, 70 Mich. 319, 320 (1888). And see *People v. Geddes*, 301 Mich. 258, 261 (1942)("The degree of resistance required to be shown in rape cases is generally said to be 'resistance to the utmost"). And there is the rather remarkable statement of Dean Wigmore that "*[N]o judge should ever let a sex offense charge go to the jury unless the female complainant's social history and mental makeup have been examined and testified to by a qualified physician*" (emphasis in the original). 3 Wigmore, *Evidence* (Chadbourn Revision) § 924a, p. 736. As one court has well put it, "[N]otwithstanding our great respect for this eminent authority on the law of Evidence, this statement never has been and is not in accord with the law of this State and is, in our opinion, completely unrealistic and unsound." *State v. Looney,*240 S.E.2d 612, 622 (N.C. 1978).

[122] See *People v. Mikula,* 84 Mich.App. 108, 115 (1978); *People v. Slovinski,* 166 Mich.App. 158, 170 (1988).

B. Rule 608 and the Rape-Shield Provisions Interact and Overlap

(1) The Rules

Rape-shield protections are found both in statute and in our evidence code. MRE 404 prohibits the use of character proof with regard to any victim other than a homicide victim where self-defense is raised, and then reputation or opinion evidence may be offered on the trait of aggression. Even where character proof is allowed, specific acts are barred as a form of proof by MRE 405(a).[123] MRE 404(a)(3) allows evidence of specific acts of the victim's past sexual conduct with the defendant (the evidence goes to a defense of consent), and evidence of past sexual activity with third parties that goes to showing the source or origin of semen, pregnancy, or disease.[124] These uses of specific acts are not character proof at all, the evidence being offered for other purposes than the character of the victim. The statute contains the same limitations, and adds a procedural

---

[123] MRE 405(b) allows admission of specific acts as a permissible form of proof of character where "character or a trait of character" is an "essential *element* of a charge, claim, or defense...." (emphasis supplied). Amicus is unaware of any crime or any defense where character is an "essential element." See e.g. *United States v Keiser*, 57 F3d 847 (CA 9, 1995) ("The relevant question should be: would proof, or failure of proof, of the character trait by itself actually satisfy an element of the charge, claim, or defense? If not, then character is not essential and evidence should be limited to opinion or reputation....We conclude...that...violent character (of the victim) does not constitute an essential element of...the claim that the shooting was justified ...").

[124] Though the Rule does not include source of injury, its is doubtless true that if the source of injury to the victim was relevant, that the injury could have been caused during sexual activity with a third party would be admissible.

requirement[125] should the defendant seek to offer evidence of sexual activity of the victim for a permissible purpose. MCL §750.520j(2) provides:

> If the defendant proposes to offer evidence described in subsection (1)(a) or (b), the defendant within 10 days after the arraignment on the information shall file a written motion and offer of proof. The court may order an in camera hearing to determine whether the proposed evidence is admissible under subsection (1). If new information is discovered during the course of the trial that may make the evidence described in subsection (1)(a) or (b) admissible, the judge may order an in camera hearing to determine whether the proposed evidence is admissible under subsection (1).

MRE 608 governs character proof with regard to the credibility of a witness. Cross-examination is permitted on specific acts of the witness, within the discretion of the trial judge, where the acts bear on the character of the witness for truthfulness or untruthfulness, but these alleged acts may not be proven by extrinsic evidence (other than conviction of crime, governed by rule 609). The questioner is bound by the answer of the witness, and must have a good-faith basis—some basis in evidence—in order to ask the question.[126]

(2) The Interaction and Overlapping

A number of cases have held that a false accusation of sexual assault made by the victim is not within rape-shield provisions; assuming, for the moment, the truth of the allegation of false accusation, then either no sexual conduct took place at all, or any sexual conduct that occurred was

---

[125] The notice and hearing requirement is not in conflict with Rule 404(a)(3), but complementary to it. See *In Re Proposed Michigan Rules of Evidence*, 399 Mich 899, 972 (1977).

[126] *See, e.g., United States v. Adames,* 56 F.3d 737, 745 (7th Cir.1995). And see infra.

consensual. In either case, it is not sexual conduct that is relevant to credibility, but the false statement regarding it. Amicus has no quarrel with these principles.[127]

But the assumption above engaged—that the allegation of false accusation of sexual assault is true—cannot be indulged by the trial judge. The theory of relevance of the cross-examination is that it bears on credibility, but a prior accusation of sexual assault only bears on credibility of the accuser if 1)it was made, and 2)*it was false*. If a previous accusation or accusations had in fact been made, but there is not a sufficient showing of falsehood, then the evidence goes to prior sexual activity by the victim, and is barred both by rape-shield principles, as well as the simple fact that it is irrelevant, defendant's only theory of relevance—that the claim was false—having disappeared. And if there is an insufficient showing that such a claim was even made by the victim, then the evidence is simply irrelevant. On the other hand, if a sufficient showing both of a prior accusation and its falsity is made (for example, if the victim admits or has previously admitted making a prior false accusation), then this conduct of the victim is a prior act probative of credibility, and Rule 608 comes into play, permitting cross-examination but prohibiting extrinsic proof.[128] But before the

---

[127] See e.g., among others, *State v Raines*, 118 SW 3d 205, 212 (Missouri Ct. App., 2003)("evidence of a victim's prior complaints, as opposed to prior sexual conduct, does not fall within the ambit" of rape-shield provisions); *People v. Grano,* 676 N.E.2d 248,257 (Ill.App. 2 Dist.,1996))..." the legislature intended to exclude the *actual sexual history* of the complainant, not *prior accusations* of the complainant. Language or conversation does not constitute sexual activity"); *State v Bray*, 813 A.2d 571, 577 (NJ Super, 2003); *Miller v Nevada*, 779 P.2d 87, 89 (Nev, 1989)("...prior false accusations of sexual abuse or sexual assault by complaining witnesses do not constitute 'previous sexual conduct' for rape shield purposes").

[128] Application of Rule 608 to bar extrinsic proof of an alleged false accusation as an attack on veracity raises no constitutional difficulties, and is purely a matter for the law of evidence. See e.g. *Boggs v. Collins,* 226 F.3d 728, 738 (CA 6, 2000)(because "'the evidence of the alleged prior false accusation of rape was offered solely to attack the general credibility of' the victim, the district court's refusal to allow the attempted cross-examination did not violate [defendant's] confrontation rights.... *Davis* and other cases did not suggest that 'the longstanding

trial judge can determine whether the cross-examination is permitted, notice under the rape-shield provisions and an in camera hearing must be held.

Even if rape-shield provisions did not exist, Rule 608 would both limit the defendant to cross-examination of the accused with regard to alleged prior false accusations of sexual assault, barring extrinsic proof, and require an evidentiary basis—proof to substantiate that such an allegation was made, and that it was false—*before* cross-examination is allowed. Thus, Rule 608 and rape-shield provisions both interact and overlap. And this brings the discussion full circle to *Evans*, *Wilson*, and *Hackett*.

MRE 608 admits of no exceptions with regard to attacks on character for veracity. Specific instances of conduct of a witness, including the complaining witness, may be inquired into on cross-examination if probative of truthfulness or untruthfulness, but "may not be proved by extrinsic evidence." Period. Of course, under the principle of limited admissibility evidence admissible for one purpose but not another is to be admitted, though with a limiting instruction,[129] and evidence barred by MRE 608 to impeach character for veracity may be admissible for some other relevant purpose, most likely to show *bias or interest* when the facts support that inference (and when the foundational showing that the prior allegation was made, and was false, has been made).[130] But the

---

rules restricting the use of specific instances and extrinsic evidence to impeach a witness's credibility pose constitutional problems'"....while the constitution protects cross-examination if it concerns bias, motive or prejudice, 'general attacks on the credibility of a witness do not raise the constitutional concerns which the confrontation clause addresses'")(internal citations omitted).

[129] MRE 105.

[130] See e.g. *Redmond v. Kingston*, 240 F.3d 590, 593 (CA 7, 2001), noting that cases which apply Rule 608 to exclude extrinsic proof with regard to alleged prior false accusations of sexual assault are "cases in which the defendant wanted to use the falsity of the charges to

notion that cases of sexual assault should be treated differently, so that extrinsic proof of an alleged prior false accusation of sexual assault should be allowed, finds support only in company with other evidentiary principles regarding sexual assault cases that have long been denounced and repudiated. The pre-MRE principle that "the defendant should be permitted to show that the complainant has made false accusations of rape in the past" simply does not survive promulgation of the Michigan Rules of Evidence, which provide in Rule 101 that the rules "govern proceedings in the courts of this state," save for the "exceptions stated in Rule 1101." Only cross-examination—and then only when an appropriate foundation has been laid—regarding an alleged prior false accusation is permissible; extrinsic proof is barred.

Many jurisdictions have held their analogue to Rule 608 applicable to alleged false claims of prior sexual assault, barring extrinsic evidence, and those few that have gone the other way should not be followed.[131] The textual argument under Rule 608(b) is irrefutable; extrinsic proof of prior conduct bearing on untruthfulness is barred. This is not to say that no common-law evidentiary principles survive the promulgation of the rules of evidence; any evidence that is relevant under MRE 401 is admissible under MRE 402, unless it falls within some specific prohibition in the rules

---

demonstrate that the complaining witness was a liar, rather than to demonstrate that she had a motive to lodge a false accusation against the defendant. The use of evidence that a person has lied in the past to show that she is lying now is questionable, quite apart from rape-shield laws, since very few people, other than the occasional saint, go through life without ever lying, unless they are under oath....But while 'generally applicable evidentiary rules limit inquiry into specific instances of conduct through the use of extrinsic evidence and through cross-examination with respect to general credibility attacks, ... no such limit applies to credibility attacks based upon motive or bias....'"

[131] Amicus will not attempt to either catalogue or discuss all the cases; a helpful review appears in *State v Wyrick*, 62 SW 3d 751, 771 ff (2001), see particularly section B. of the opinion.

themselves, or unless under MRE 403 its probative value is outweighed, and substantially, by the danger the jury will use it for an impermissible purpose. But that common-law evidentiary principles *in conflict* with the rules of evidence did not survive adoption of those rules is demonstrated by *People v Kreiner.*[132] There this court found that the common-law "tender-years" hearsay exception did not survive the rules of evidence, as no such exception appears in the rules.[133] The court observed that under MRE 101 the rules govern proceedings in the courts of this state save for the exceptions stated in MRE 1101, and found that none of them applied. But it was not the simple absence of a tender-years hearsay exception from the rules that led to the result that this exception did not survive promulgation of the rules; rather, it was the language in MRE 802 that "hearsay is not admissible *except as provided by these rules.*"[134] Thus, the rules themselves provide that *as to hearsay* nothing survives the creation of the hearsay rules, as no hearsay is admissible but for those exceptions listed in the rules.

On the other hand, the principle of impeachment of the credibility of a witness by bias or interest—rather than veracity generally, which is governed by Rule 608 and Rule 609—appears nowhere in the rules of evidence, and yet there is no doubt that evidence impeaching a witness on this basis is admissible.[135] Indeed, amicus agrees that even extrinsic proof going to bias or interest, assuming a sufficient foundation is laid, must be admitted when offered by the defense as a matter of Confrontation Clause principles; the evidence is not barred by Rule 608 because offered for a

---

[132] *People v Kreiner*, 415 Mich 372 (1982).

[133] Now see MRE 803A, promulgated in 1991.

[134] *People v Kreiner*, 415 Mich at 377-378 (emphasis added).

[135] See e.g. *United States v Abel*, 469 US 45, 83 L Ed 2d 450, 105 S Ct 465 (1984).

different purpose than to impeach veracity generally. This is not inconsistent with *Kreiner*, or with a recognition that Rule 608 bars extrinsic proof of prior acts going to character for veracity of a witness. The rules *themselves* state that no hearsay is admissible if not within the exceptions covered by the rules, and Rule 608 states itself that extrinsic proof of prior acts bearing on character for veracity is barred. Where, then, there is no express prohibition on evidentiary principles derived from without the rules, Rules 401 and 402 provide the basis for use of common-law evidentiary principles, as Rule 401 defines relevant evidence as evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence, and Rule 402 provides that all relevant evidence is admissible except as otherwise provided.

Given the unambiguous bar of extrinsic proof of prior acts to impeach character for veracity, and the lack of any constitutional objection to it,[136] defendant can only prevail by arguing for creation of an exception to it for allegedly false accusations of sexual assault, treating these differently than other specific instances of conduct bearing on untruthfulness. But as a matter of principled rule-making, rules of procedure or evidence should not be modified through case decision unless that

---

[136] Again, understanding that the bar does not apply when, under the principle of limited admissibility, the evidence is offered—and appropriately so—not to impugn character for veracity, but as going to motive or bias in the particular case; the constitution requires this sort of evidence be admitted, and Rule 608 does not bar it in any event. Though admission of the evidence may be required by the constitution, this fact does not create an "exception" to the Rule 608 bar on extrinsic evidence. Rather, when the evidence is offered to show bias instead of to attack character for truthfulness it simply is not within the Rule 608 bar, whether its admission is required by the constitution or not. See 2 Graham, *Handbook of Federal Evidence* (5th Ed., 2001), § 608.4, p. 156, fn 16 (noting that on occasion courts mistakenly treat "the admissibility of extrinsic evidence of bias as an exception to Rule 608(b) instead of as falling outside of Rule 608(b))."

result is found necessary under some statute or the constitution; unless so compelled, modifications to rules should occur through the ordinary rule-making and amendment process, with announcement of a proposal to the bench and bar, and an opportunity for comment. Even more critically here, no modification of the bar to create an exception for alleged false claims of sexual assault should be considered in any event. As noted in *State v Wyrick*, supra, the majority of jurisdictions to consider the question apply Rule 608(b)'s prohibition on extrinsic proof to allegations of prior false claims of sexual assault, where offered as probative of character for untruthfulness. Some courts that permit extrinsic proof do so because in that jurisdiction the admissibility of prior sexual assaults by the defendant has been broadened substantially.[137] Some have held extrinsic proof admissible on a misunderstanding of constitutional requirements, taking the requirement of admission of extrinsic evidence for a non-character purpose such as bias or interest as a general requirement of admission of extrinsic proof where probative of character for untruthfulness,[138] where there is no such constitutional requirement.[139] And some create an exception for this sort of intrinsic proof for reasons which are simply unfortunate, a throwback to an earlier error, echoing the suspicion of rape

---

[137] See e.g. *Miller v State*, 779 P2d 87, 89-90 (Nev, 1989), creating, by case decision, an exception to the Nevada rule against extrinsic proof of prior acts probative of untruthfulness for sexual assault cases ("...we carve out an exception for sexual assault cases") largely because to do so was "in *pari ratione* with this court's current position regarding sexual assault cases and the admissibility of extrinsic impeachment evidence against defendants."

[138] Making this error see *State v Walton*, 715 NE2d 824, 827 (Indiana, 1999).

[139] See *Boggs v Collins*; *Redmond v Kingston*, supra.

victims voiced decades ago by Wigmore.[140] This court should not go down that path, particularly by way of opinion rather than proposed court-rule amendment.

To sum up, under the rape-shield provisions the defendant must file notice and an in camera hearing must be held, for the mere assertion that the victim has made a previous accusation of sexual assault, and that the prior accusation was false, does not make it so, and if it is *not* so then the evidence is either irrelevant (if no claim was ever made) or both irrelevant and barred by rape-shield principles (if a prior claim was made but was not false). And even if rape-shield provisions are wholly inapplicable, the foundational requirement for cross-examination on a prior act bearing on untruthfulness also requires some demonstration that the claim was made, as well as that it was false. Even if this foundation is met, only cross-examination is permitted, not extrinsic proof. "This brings us to the question: how does a defendant prove that a complaining witness has made false accusations of sexual assault?"[141]

C. The Foundation Requirements for Cross-Examination on An Alleged Prior False Accusation of Sexual Assault

To escape the bar of the rape-shield provisions, and at the same time to establish an appropriate foundation for cross-examination on an alleged prior false claim of sexual assault under Rule 608, what evidentiary burden must the defendant shoulder regarding whether such a claim was made at all, and if so, that it was false? It must be remembered that involved here is *evidence* itself

---

[140] See *Lopez v State*, 18 SW3d 220, 223-224 (Ct. Crim. App, Texas, 2000), observing that those states that have creating a special exception for sexual offenses to the Rule 608(b) bar have done so for a rationale that "is not at all clear," the court rejecting any "sexual offenses are different" rationale for avoiding the extrinsic proof prohibition.

[141] *Morgan v. State,* 54 P.3d 332, 336 (Alaska App.,2002).

viewed as collateral—and so the evidence is not permitted, but only cross-examination as to it. Where that collateral evidence carries with it a substantial possibility of confusing the issues and causing unfair prejudice under Rule 403, as here, it is appropriate to apply a strict foundational standard before the cross-examination is permitted.

The ordinary foundational requisite for cross-examination on a prior act bearing on untruthfulness is that the proponent of the cross-examination demonstrate a "good-faith basis" that the act occurred.[142] This notion is only vaguely defined in the cases; the clearest statement is that "the general rule is that the questioner must be in possession of some facts which support a genuine belief that the witness committed the offense or the degrading act to which the questioning relates."[143] With regard to sexual conduct, the rape-shield rules, as well as Rule 403, counsel something more strenuous. And in a related context, the Court of Appeals has established a heightened evidentiary foundation.

The defendant in *People v Morse*[144] was charged with sexual assault if his former wife's daughters. These unfortunate children had previously been assaulted by defendant's ex-wife's boyfriend, who had pled guilty to offenses against them. Defendant wished to admit evidence of

---

[142] In this circumstance Rule 104(a) on preliminary questions of admissibility, under which the trial judge makes a determination by a preponderance of the evidence as to whether foundational requirements have been met, with the rules of evidence themselves, except those with respect to privileges, inapplicable, is not the governing rule, as the evidence itself is not admissible, but only cross-examination. See 2 Graham, *Handbook of Federal Evidence*, § 608.4, p. 145 (fn 3, beginning on p.144)

[143] *United States v. Fowler,* 465 F.2d 664, 666 (CA DC, 1972); *United States v. Sampol*, 636 F.2d 621, 657 (CA DC, 1980); *United States v. Ovalle-Marquez*, 36 F.3d 212, 218 (CA 1, ,1994).

[144] *People v. Morse*, 231 Mich.App. 424 (1998).

these assaults, arguing that the victims' allegations against him were "highly similar" to the prior sexual abuse, and that without evidence of that assault before the jury the jury would "inevitably conclude that the complainants' highly age-inappropriate sexual knowledge could only come from *defendant* having committed such acts."[145] After a survey of cases from other jurisdictions, the court concluded that this evidence is admissible if the defendant meets a rather stringent foundation:

> Accordingly, Michigan law dictates that an in-camera hearing is appropriate to determine whether: (1) defendant's proffered evidence is relevant, (2) defendant can show that another person was convicted of criminal sexual conduct involving the complainants, and (3) the facts underlying the previous conviction are significantly similar to be relevant to the instant proceeding.[146]

And this foundation was required for the admission of extrinsic proof; that is, as to evidence *not* deemed collateral. A strict evidentiary foundation before cross-examination is permitted on a matter that is, as to actual proof, collateral, is thus appropriate, at least where the matter is itself fraught with the possibility of undue prejudice.

It is important to bear in mind the nature of the cross-examination permitted—when the trial judge allows it—under Rule 608. The extrinsic proof that is disallowed by Rule 608(b) cannot be smuggled into the questioning itself. While it is perfectly appropriate to ask a witness, where cross-examination has been permitted, whether he once falsified his time-card so as to gain extra pay, it is inappropriate to ask whether he was once discharged from employment for falsifying his time-card. And where cross-examination is permitted on alleged prior false claims of sexual assault, it

---

[145] *Morse*, at 426.

[146] *Morse*, at 437.

is appropriate for the questioner to ask "in May of 1994 did you not accuse John Smith of sexually assaulting you in your home, an accusation that was false?" But the questioner may *not* ask "in May of 1994 did you not accuse John Smith of sexually assaulting you in your home, an accusation that was false *and for which John Smith was acquitted by a jury?"* (assuming the latter point to be true). This is so because extrinsic proof, or the opinion of someone else about the alleged event, cannot be smuggled in through the questioning:

> Cross-examination as to a specific instance relating to the character for untruthfulness of the particular witness being examined...should be phrased in terms of the underlying event itself....the question should not inquire about rumors, reports, arrests, or indictments, but rather about the underlying specific event of misconduct itself. The fact of misconduct alone is relevant when cross-examining the alleged actor, not whether someone else might think that the witness committed the act.[147]

In the time-card example, it may be true that the witness was fired for this reason, but the witness may insist that the firing was unjust. *That* matter cannot be tried in the case, as it is collateral. The questioner can only ask about the underlying *event*—the forgery of the time-card—and if the witness denies it, that ends the matter. So also with alleged false allegations of sexual assault. An acquittal at a trial shows that those jurors in that trial had a reasonable doubt, but it does not prove the allegation was false, and it is wholly appropriate for the victim to testify that he or she did not make a false allegation. Again, that matter cannot be tried, as it is collateral, and extrinsic proof (the jury acquittal, though it is not even proof that the allegation was false) cannot be smuggled into the case through the questioning.

---

[147] 2 Graham, *Handbook of Federal Evidence*, § 608.4, p.153.

Only two possibilities exist, then, when a victim is cross-examined about an alleged prior false allegation of sexual assault, that questioning being restricted to that which is relevant—"the underlying specific event of [alleged] misconduct itself": 1)the witness will admit that a prior false claim was made, or 2)the witness will deny it. If the witness admits making a prior false allegation, then the witness may explain why this occurred, the admission of the allegation is itself substantive evidence, and the parties may make of the testimony what they will in arguing the credibility of the witness. But if the witness denies making a prior false allegation (which may either be because no allegation was made, or an allegation was made which was not false), all that is left before the jury is innuendo, with which the questioner may do nothing in argument. Unless, then, it is determined at a pretrial in camera hearing that the witness will admit having made a prior false allegation, or that there exists some form of almost indisputable proof that a prior false allegation was made, the cross-examination is substantially more prejudicial than probative—indeed, not probative *at all*—and should not be permitted. Indeed, one respected commentator has suggested that allowing cross-examination on prior acts of misconduct bearing on character for untruthfulness under Rule 608(b) is "too inherently prejudicial in light of probative value and thus should rarely if ever be permitted."[148]

---

[148] 2 Graham, *Handbook of Federal Evidence*, § 608.4, p.161. Graham goes so far as to state that in this regard "Rule 608(b)(1) is simply a mistake." See, to the same effect, McCormick, *Evidence* (4th Ed, 1992) § 41, p. 138-139, commenting that the view that prohibits cross-examination on prior acts as going to credibility (other than convictions) is "arguably the fairest and most expedient practice because of the dangers otherwise of prejudice...., of distraction and confusion, of abuse by the asking of unfounded questions, and of the difficulties, as demonstrated in the cases on appeal, of ascertaining whether particular acts relate to character for truthfulness."

Those jurisdictions that have considered the foundation for permitting cross-examination on alleged prior false accusations have reached a variety of results. As to whether the accusation was even made, and that it was false, some jurisdictions require a finding by the trial judge by a preponderance of evidence, some require clear and convincing evidence, some state the test as a "reasonable probability of falsity," some state the test as whether "reasonable jurors could find, based on the evidence presented by the defendant, that the victim had made prior false accusations," and some require that the defendant show that there was a prior accusation that was "demonstrably false."[149] For the reasons stated above—that a denial leaves the jury simply with innuendo but no evidence—amicus submits that this court should require as a foundation that at a pretrial hearing the defendant must show that a "demonstrably false" prior accusation was actually made, or it must be demonstrated that the victim-witness will admit to having made a prior false claim. "Demonstrably false" must mean more than simply "contradicted," as by the claimed perpetrator of the prior event, but proven false in some way, as when rebutted by physical evidence.[150]

D. Conclusion

Amicus urges the following points on the court:

- While a prior false claim of sexual assault is not within rape-shield protections, an *allegation* that a prior false claim was made is not necessarily true. Because a prior claim may have been made but which was *not* false, implicating prior sexual activity of the victim

---

[149] See listing in *State v Guenther*, 854 A2d 308, 322 (New Jersey, 2004).

[150] See *Fugett v State*, 812 NE2d 846, 849 (Ct App Indiana, 2004): "...evidence of prior false accusations may be admitted, but only if (1) the complaining witness admits he or she made a prior false accusation of rape; or 2) the accusation is demonstrably false....Prior accusations are demonstrably false where the victim has admitted the falsity of the charges or they have been disproved."

(albeit nonconsensual), the notice and hearing provisions of the rape-shield statute should be followed.

- Independent of the rape-shield provisions, an alleged prior false accusation of sexual assault is an allegation of a prior act of misconduct going to the victim's character for untruthfulness. It is not relevant unless in fact 1)it was made, and 2)it was false. A foundation prior to cross-examination must be laid. Further, under Rule 608(b) only cross-examination, and not extrinsic proof, is permitted on the point.

- An allegation of a prior false claim that is demonstrated, at a pretrial hearing, to be relevant not to character for untruthfulness but to bias or interest in bringing the current charges, is not within Rule 608(b) and may be proven with extrinsic proof. An additional purpose of the pretrial hearing, then, is, where appropriate, to determine whether the allegation of a false claim is relevant to this non-character purpose.

- Where permitted, cross-examination as to an alleged prior false claim of sexual assault allowed as going to character for untruthfulness must "be phrased in terms of the underlying event itself....The fact of misconduct alone is relevant when cross-examining the alleged actor, not whether someone else might think that the witness committed the act."

- Because a denial of an allegation on cross-examination that the victim made a prior false claim of sexual assault leaves nothing before the jury but innuendo, this cross-examination should—when offered only as going to character for untruthfulness—rarely be permitted. As a foundational matter, the defendant should be required first to prove that the defendant made a prior allegation that was demonstrably false. "Demonstrably false" means disproven, not simply contradicted.[151]

---

[151] A brief discussion of *White v Coplan*, 399 F3d 18 (CA 1, 2005) is likely appropriate. Two young girls accused a male visitor, who had spent much of the evening watching television with them in a room apart from the other adults, with molestation. He wished to cross-examine the children about accusations of sexual assault they had made against a neighbor, a cousin, and another individual, all involving separate incidents. Defendant pointed to a similarity between the nature of some of the accusations. The trial judge precluded the cross-examination because

Though amicus leaves exposition of the point to the able presentation of the representative of the People of the State of Michigan in this matter, amicus would note simply that no offer was made that any prior false allegations here went to motive or bias, so as to avoid the bar in Rule 608(b), and thus that bar applies. As to cross-examination, defendant first made no claim that any prior accusation was false, and then, when in an untimely motion for reconsideration he claimed it was false, his only offer of proof of its falseness was that the alleged perpetrator would deny it (and this through an assertion by defendant's counsel). Nothing else was before the trial judge. And even on a motion for stay, when defendant tried to offer additional proof, the only claim there (made orally) was that the alleged perpetrator's fiancee would also say the accusation was false. No affidavit or written offer of proof was made, nor any request for an in camera hearing. Defendant's claim was a hodge podge of inconsistent assertions, never sufficiently supported to meet *any* foundational standard. The trial judge can hardly be found to have erred under these circumstances.

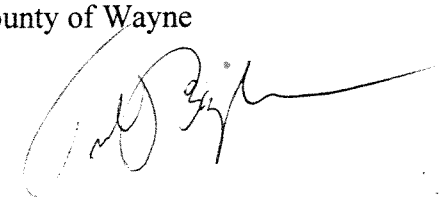
New Hampshire requires a showing that the accusations were demonstrably false, and though the judge found the accusations had been shown false to a "reasonable probability," they had not be shown to be "demonstrably false." The First Circuit found constitutional error, for reasons which are doubtful in the extreme. Though the court did not quarrel with the exclusion of extrinsic proof, so that if the girls denied the prior accusations were false all that would be before the jury was the innuendo of the questions. In an analysis that amicus submits should not be followed, the court said that simply asking the questions and getting the denials of the witnesses "is worth a great deal," finding that from the inquiry itself the defense might have benefitted. More importantly, the case is readily distinguishable from the instant case. The court found that the *pattern* of multiple false accusations, with fair similarity to the present charge, raised the issue of *motive* to testify falsely, even though the motive might be unknown (perhaps to garner attention). Though believes this analysis a tenuous application of the "bias or interest" principle, nonetheless it is also inapplicable to the present case.

Relief

WHEREFORE, amicus requests that the Court of Appeals be affirmed.

Respectfully submitted,

KYM L. WORTHY
Prosecuting Attorney
County of Wayne



TIMOTHY A. BAUGHMAN
Chief of Research,
Training and Appeals